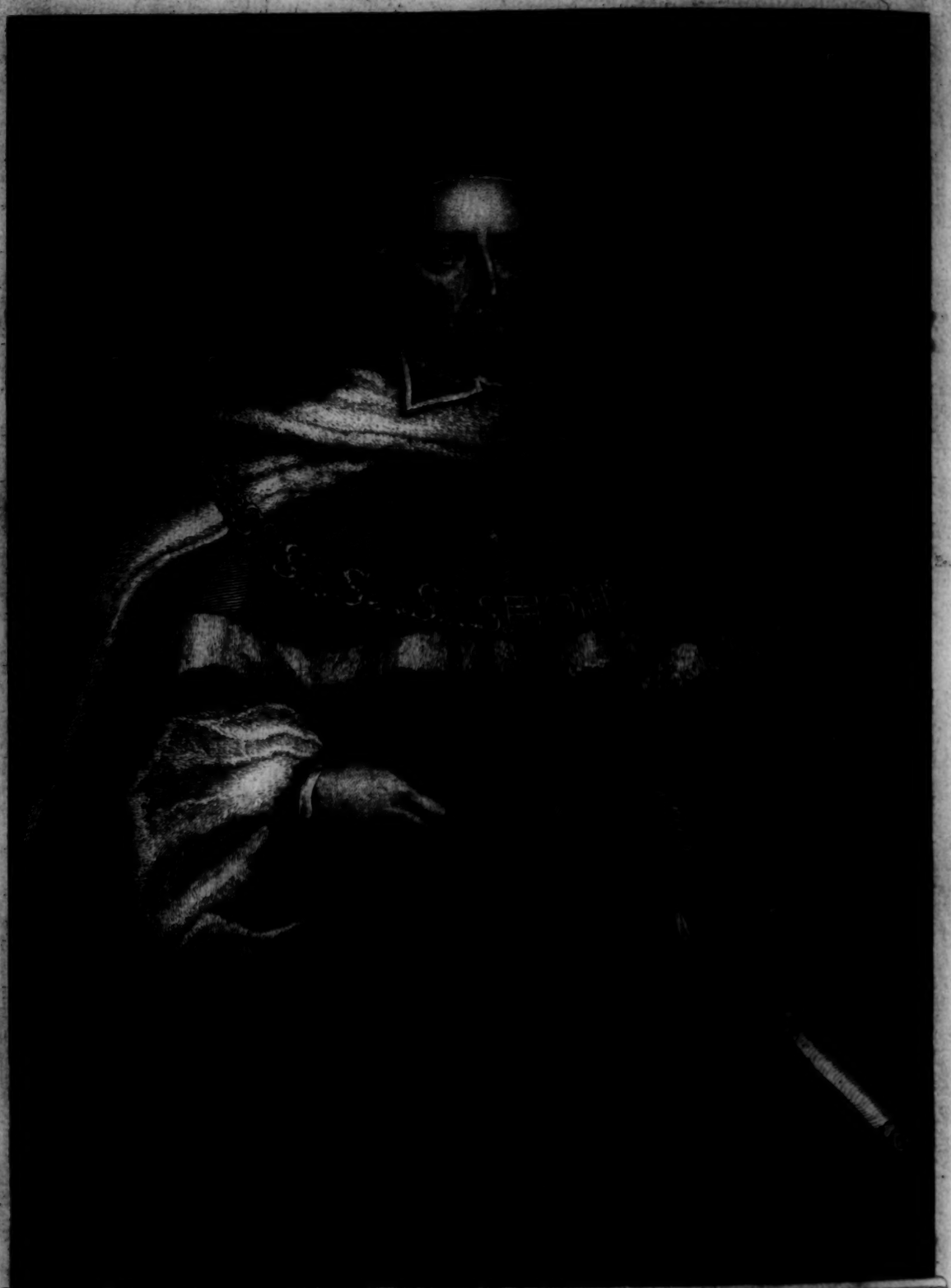
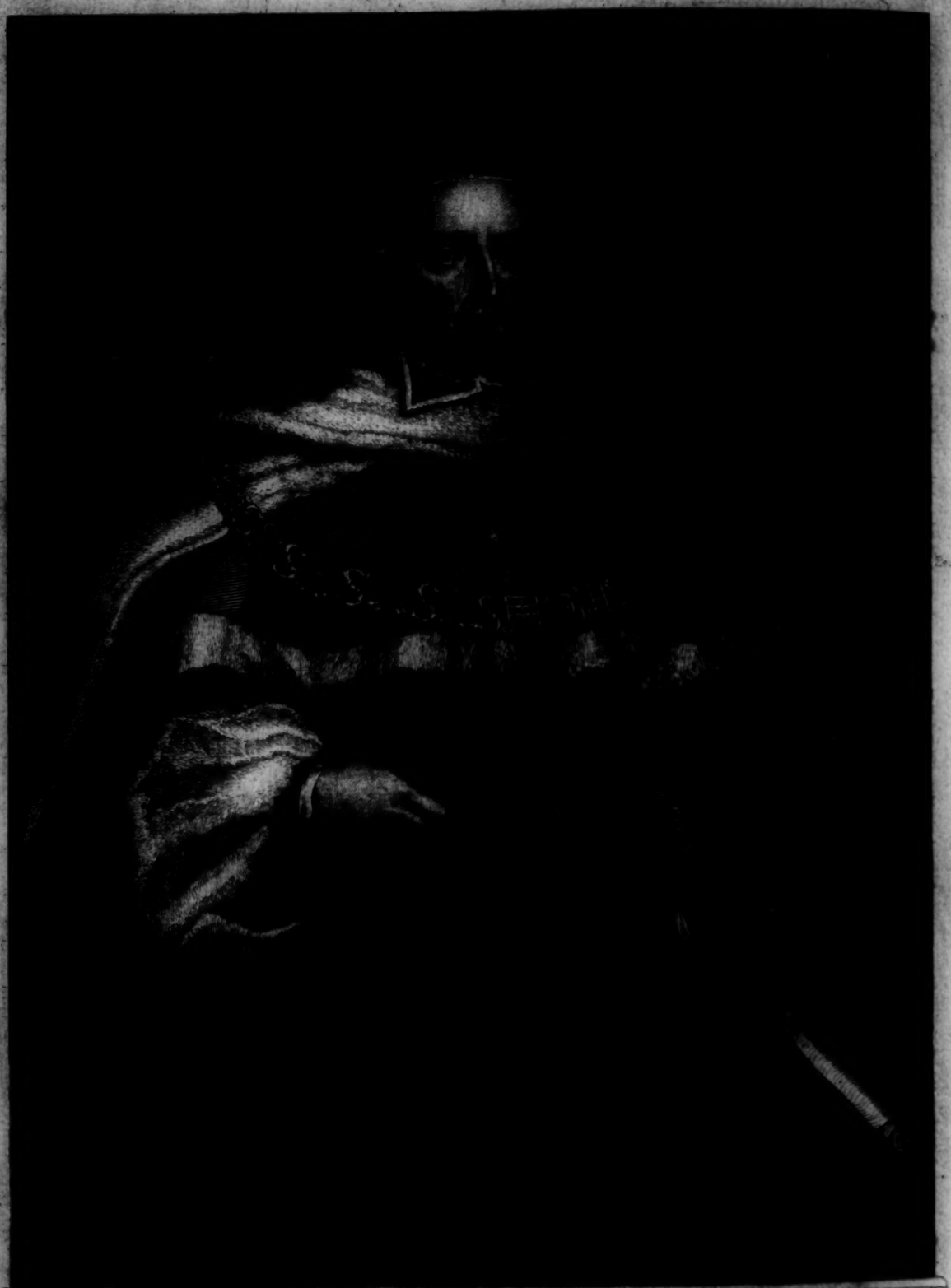


Sr. MATTHEW HALE Kt.
LORD CHIEF JUSTICE
of His Majesty's Court of
KING'S BENCH.

Michael Wright pinxt. From an Original painting in Guildhall London. Geo: Vertue Sculp. 1735



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HISTORIA
PLACITORUM CORONÆ.

THE
HISTORY
OF THE
Pleas of the Crown.

By Sir *MATTHEW HALE* Knt. ſometime Lord Chief Juſtice of the Court of King's Bench.

Now firſt publiſhed from his Lordſhip's Original Manuſcript, and the ſeveral References to the Records examined by the Originals, with large Notes.

By *SOLLOM EMLYN* of *Lincoln's-Inn* Eſq;

To which is added
A Table of the Principal Matters.

In Two Volumes.

VOL. I.

In the SAVOY:
Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer*, Eſq;) for *F. Gyles* over-againſt *Grays-Inn* in *Holborn*, *T. Woodward* at the Half-Moon between the Two *Temple-Gates* in *Fleet-ſtreet*, and *C. Davis* in *Pater-noſter-row*.
M DCC XXXVI.

F
Cr Ty
H 1618

HISTORIA

PLACITORUM CORONÆ.

To the RIGHT HONOURABLE

Sir JOSEPH JEKYLL Knt.

MASTER of the ROLLS.

Extract from the Journal of the Houſe of Commons.

Lunæ 29° die Novemb. 1680.

Orderd, That the Executors of Sir *Matthew Hale*, late Lord Chief Juſtice of the court of King's Bench, be deſired to [illegible] the Manuſcript of the Crown-law, and that a Committee be appointed to take care in the printing thereof, and if it be reformed

A wherein it had long ſince been [illegible] which for the preſs you were pleaſed to commit to my care, I thought it became me to [illegible] your name on that, to which I am to [illegible] for know I any to whom it could with greater propriety be addreſt, than to one, who bears ſo near a reſemblance to the author in thoſe great and good qualities, for which he was ſo deſervedly eſteemed.

An unblemiſhed integrity and upright conduct in every character of life, whether as a private perſon, a ſenator, or a judge; A generous frankneſs and open ſincerity in converſation; An unalterable adherence in all ſtations to the principles of civil and religious liberty, accompanied with a ſerious regard to true piety and virtue; A firm attachment to our conſtitution in times of the greateſt difficulty and danger; A diſintereſted zeal for the welfare of mankind, manifeſted by unwearied

Sir Will. Jones
Sir Edm. Saunders
Mr. Serjeant
Mr. Geo. Pollexfen
Sir Fra. Winnington
Mr. Paul Foley

3 1 7 1 3 4

To the RIGHT HONOURABLE

Sir *JOSEPH JEKYLL* Knt.

MASTER of the ROLLS,

And One of his Majesty's most Honourable Privy-Council.

SIR,

AS it is to you that the public are indebted for rescuing this valuable work from the obscurity wherein it had long lain, the preparing of which for the press you were pleased to commit to my care, I thought it became me to inscribe your name on that, to which you are so justly intitled: Nor know I any to whom it could with greater propriety be addrest, than to one, who bears so near a resemblance to the author in those great and good qualities, for which he was so deservedly esteemed.

An unblemished integrity and upright conduct in every character of life, whether as a private person, a senator, or a judge; A generous frankness and open sincerity in conversation; An unalterable adherence in all stations to the principles of civil and religious liberty, accompanied with a serious regard to true piety and virtue; A firm attachment to our constitution in times of the greatest difficulty and danger; A disinterested zeal for the welfare of mankind, manifested by unwearied

unwearied labours for the public good, uninfluenced by the ſpirit of a party or any ſiniſter motive, are excellencies, which no leſs eminently diſtinguiſh you than they did the author of this treatiſe; and as they procured him ſuch a laſting veneration and eſteem, ſo while the ſame cauſes are productive of the ſame effects, they will in like manner tranſmit your memory to after-times with honour and renown.

To enlarge upon this ſubject, how agreable ſoever to others, would I know be offenſive to you, who are more regardful of the approbation of your own mind, than any outward applauſes, and while you are intent upon really being and doing good, are no leſs ſtudious to avoid all oſtentatious ſhews of it. I ſhall therefore only add, that I am,

SIR,

A *With great reſpect*,

Your Honour's

Moſt obedient

Humble ſervant,

Solloni Emlyn.

THE PREFACE.

THE following treatise being the genuine offspring of that truly learned and worthy judge, Sir *Matthew Hale* (*a*) stands in need of no other recommendation, than what that great and good name will always carry along with it.

Whoever is in the least acquainted with the extensive learning, the solid judgment, the indefatigable labours, and above all the unshaken integrity of the author, cannot but highly esteem whatever comes from so valuable an hand.

Being brought up to the profession of the law he soon grew eminent in it, discharging his duty therein with great courage and faithfulness and tho he lived in critical times, when disputes ran so high between king and parliament, as at last broke out into a civil war, yet he engaged in no party, but carried himself with such moderation and evenness of temper, as made him loved and courted by all.

It was this great and universal esteem he was then in, that made *Cromwel* so desirous to have him for one of his judges, which offer he would willingly have declined. Being prest by *Cromwel* to give his reason

(*a*) He was born at *Alderley* in *Glocestershire*, *Nov.* 1, 1609.

Was entered at *Magdalen-Hall* in *Oxford* in the 17th year of his age.

Admitted of *Lincolns-Inn*, *Nov.* 8, 1629.

Made a Judge of the court of *Common Pleas* 1653.

Lord Chief Baron of the Court of *Exchequer*, *Nov.* 7, 1660.

And at last Lord Chief Justice of the court of *King's Bench May* 18, 1671.

Which place he resigned *Feb.* 20, 1675-6.

And died the *Christmas* following, *Dec.* 25, 1676.

he at last plainly told him, that he was not satisfied with the lawfulness of his authority, and therefore scrupled the accepting any commission under it, to which *Cromwel* replied, that since he had got the possession of the government, he was resolved to keep it, and would not be argued out of it; that however it was his desire to rule according to the laws of the land, for which purpose he had pitcht upon him as a proper person to be imployed in the administration of justice, yet if they would not permit him to govern by red gowns, he was resolved to govern by red coats.

Upon this consideration, as also of the necessity there at all times is, that justice and property should be preserved, he was prevailed with to accept of a judge's place in the court of common-pleas, wherein he behaved with great impartiality, constantly avoiding the being concerned in any state-affair, and tho for the first two or three circuits he sat indifferently on the plea-side or the crown-side, yet afterwards he absolutely refused to sit on the crown-side, thinking it the safer course in so dubious a case.

But notwithstanding his dislike to *Cromwel*'s government, yet this did not drive him, as it did some others, into the extremes of the contrary party; for upon the restoration, of which he was no inconsiderable promoter, he was not for making a surrender of all, and receiving the king without any restrictions; on the contrary he thought this an opportunity not to be lost for limiting the prerogative, and cutting off some useless branches, that served only as instruments of oppression, for which purpose he moved, as bishop *Burnet* relates (*b*), "That a committee might be ap-
"pointed to look into the propositions that had
"been made, and the concessions that had been of-

(*b*) *Burnet*'s hist. of own times, *Vol.* I. *p.* 88.

"ferd by the late king, and from thence to digeſt "ſuch propoſitions, as they ſhould think fit to be ſent "over to the king.

This motion was ſeconded, and tho through general *Monk*'s means it faild of ſucceſs, yet it ſhewed our author's tender regard for the liberties of the ſubject, and that he was far from being of a mind with thoſe, who look on every branch of the prerogative as *jure divino* and indefeaſible.

But notwithſtanding this attempt, which ſhewed he was not cut out for ſuch compliances, as uſually render a man acceptable to a court, yet ſuch was his unblemiſhed character, that it was thought an honour to his majeſty's government to advance him firſt to the ſtation of Lord Chief Baron, and afterwards to that of Lord Chief Juſtice of the king's bench; nor indeed could ſo great a truſt be lodged in better hands.

When he was firſt promoted, the Lord Chancellor *Clarendon* upon delivering to him his commiſſion told him among other things, "That if the king could "have found out an honeſter or fitter man for that im-"ployment, he had not advanced him to it, and that "he had therefore preferd him, becauſe he knew "none, that deſerved ſo well (*c*).

He behaved in each of theſe places with ſuch uncorrupt integrity, ſuch impartial juſtice, ſuch diligence, candor, and affability, as juſtly drew the chief practice after him, whitherſoever he went; he conſtantly ſhund not only the being corrupt, but every thing which had any appearance, or might afford the leaſt ſuſpicion of it; he was ſincerely bent on diſcovering the truth and merits of a cauſe, and would therefore bear with the meaneſt counſel, ſupply the defects of the pleader, and never take it amiſs, when ſumming up the evidence, to be reminded of any circumſtance

(*c*) *Burnet*'s life of *Hale*, *Edit.* 1682. *p.* 53.

cumſtance he had omitted, for being in a high degree poſſeſt of that qualification ſo peculiarly neceſſary to a judge, I mean patience, (without which the moſt excellent talents may become inſignificant,) no conſiderations of his own convenience could prevail with him to hurry over a cauſe, or diſpatch it without a thorough examination, for which reaſon he made it a rule, eſpecially upon the circuits, to be ſhort and ſparing at meals, that he might not either by a full ſtomach unfit himſelf for the due diſcharge of his office, or by a profuſe waſte of time be obliged to put off, or precipitate the buſineſs that came before him.

He was a great lamenter of the diviſions and animoſities, which raged ſo fiercely at that time among us, eſpecially about the ſmaller matters of external ceremonies, which he feard might in the end ſubvert the fundamentals of all religion: And tho he thought the principles of the non-conformiſts too narrow and ſtrait-laced, yet could he by no means approve the penal laws, which were then made againſt them; he knew many of them to be ſober, peaceable men, who were well affected to the government, and had ſhewn as much diſlike as any to the late uſurpation, and therefore he thought they deſerved a better treatment; beſides he lookt on it as an infringement on the rights of conſcience, which ought always to be held ſacred and inviolable, and therefore uſed to ſay, that the only way to heal our breaches was *a new act of uniformity*, for which purpoſe he concurd with Lord Keeper *Bridgman* and Biſhop *Wilkins* in ſetting on foot a ſcheme for the comprehenſion of the more moderate diſſenters, and an indulgence towards others, and drew the ſame up into the form of a bill, altho by a vote of the houſe of commons it was prevented from being laid before the parliament.

Tho by this means he was hinderd from obtaining a repeal of thoſe laws, yet could he never be brought to give any countenance to the execution of them. I have heard it credibly related, that once when he was upon the circuit there happend to be a grand jury, who thought to make a merit of preſenting a worthy peaceable non-conformiſt that liv'd in their neighbourhood; upon this occaſion our judge could not avoid reprimanding them for their ill-placed zeal, which vented itſelf this way, while no notice was taken of the prophaneneſs, drunkenneſs, and other immoralities, which abounded daily amongſt them; in ſhort, he told them, that if they were reſolved to perſiſt, he would remove the affair to *Weſtminſter-Hall*, and if he could not then prevail to have a ſtop put to it, he would reſign his place, for he had told the king when he firſt accepted it, that if any thing was preſt upon him, which was againſt his judgment, he would quit his poſt.

He always retaind a ſerious impreſſion of religion, and in particular was a punctual obſerver of any vow or engagement he had laid himſelf under. Having in his younger days on a particular occaſion made a vow never to drink an health again, he could never be prevaild on upon any conſideration to diſpenſe with it, altho drinking healths was then grown to be the faſhionable loyalty of the times.

And thus in every character of life he was a pattern well worthy of imitation: in ſhort, he was a public bleſſing to the age he lived in, and not to that only, but by his bright and amiable example to ſucceeding generations; for as a pattern of virtue and goodneſs will always be a ſilent, tho ſharp reproof to thoſe who deviate from it, ſo to noble and generous minds it will not fail of being a mighty ſpur and incentive to

the imitation of it, and by that means leave a real and laſting, tho ſecret influence behind it.

As he juſtly merited the eſteem of all, ſo in particular he has well deſerved of the profeſſion of the law, to which he was ſo ſhining an ornament; he contributed more by his example to the removal of the vulgar prejudices againſt them, than any argument whatever could do.

The great Archbiſhop *Uſher* had entertaind ſome prejudices of that kind, but by converſation with our author and the learned *Selden*, he was convinced of his miſtake; our author declaring, "That "by his acquaintance with them he believed there "were as many honeſt men among the lawyers pro-"portionably, as among any profeſſion of men in "*England*.

Never was the old monkiſh maxim, *Bonus Juriſta malus Chriſta*, more thoroughly confuted than by his example, he demonſtrated by a living argument, how practicable it was to be both an able lawyer and a good chriſtian; indeed he ſaw nothing in the one that was any way incompatible with the other, nor did he think, that an unaffected piety ſat with an ill grace on any, be his ſtation never ſo high, or his learning never ſo great; for tho he diligently applied himſelf to the buſineſs of his profeſſion, yet would he never ſuffer it ſo to engroſs his time as to leave no room for matters of a more ſerious concernment, as may appear from the many tracts he has wrote on moral and religious ſubjects.

For this reaſon, when he found the decays of nature gaining ground upon him, he could no longer be prevaild with to ſuſpend the reſolution he had taken to reſign his place, that after the example of that great emperor *Charles* V. he might have an

interſtice between the buſineſs of life and the hour of death (*d*).

No wonder then that one ſo great, ſo good, ſhould be loved and eſteemed while living, ſhould be revered and admired when dead; no wonder the king ſhould be loth to part with him, who had been ſuch a credit to his government; tho had he held his place ſome few years longer, ſuch a ſcene of affairs did then open, as in all likelihood would have greatly diſtreſt him how to behave, as well as the court how to get rid of one, who could not have been removed without great reproach, nor continued without great obſtruction to the violent meaſures, that were then purſued.

But it is time to ſtop, for I mean not to write the hiſtory of his life, this would require a volume of it ſelf, and is long ago performed by an able hand (*e*); I ſhall therefore only ſubjoin his character as drawn by that learned prelate and other eminent cotemporaries, by which it will appear, that future times cannot outgo his own in the veneration and eſteem they bore him.

The biſhop expreſſes it in ſhort thus, " That he was " one of the greateſt patterns this age has afforded, " whether in his private deportment as a chriſtian, or " in his public employments, either at the bar or on " the bench (*f*)"; having given it more at large (*g*) in the words of a noble perſon, whom he ſtyles one of the greateſt men of the profeſſion of the law (*h*), " He would never be brought to diſcourſe of public " matters in private converſation, but in queſtions of " law when any young lawyer put a caſe to him he " was very communicative, eſpecially while he was at " the

(*d*) *Inter vitæ negotia & mortis diem oportere ſpatium intercedere.* Strada de bello Belgico, Vol. I. *ſub anno* 1555.

(*e*) Bp. *Burnet.*

(*f*) *p.* 218.

(*g*) *p.* 172.

(*h*) Suppoſed to be the then earl of *Nottingham.*

" the bar: But when he came to the bench, he grew
" more reſerved, and would never ſuffer his opinion in
" any caſe to be known, till he was obliged to declare
" it judicially; and he conceald his opinion in great
" caſes ſo carefully, that the reſt of the judges in the
" ſame court could never perceive it; his Reaſon was,
" *becauſe every judge ought to give ſentence according to*
" *his own perſwaſion and conſcience, and not to be ſwayed*
" *by any reſpect or deference to another man's opinion:*
" And by this means it happend ſometimes, that when
" all the barons of the Exchequer had deliverd their
" opinions, and agreed in their reaſons and argu-
" ments, yet he coming to ſpeak laſt, and differing
" in judgment from them, hath expreſt himſelf with
" ſo much weight and ſolidity, that the barons have
" immediately retracted their votes and concurred with
" him. He hath ſate as a judge in all the courts of
" law, and in two of them as chief, but ſtill where
" ever he ſat, all buſineſs of conſequence followed
" him, and no man was content to ſit down by the
" judgment of any court, till the caſe was brought
" before him, to ſee whether he were of the ſame
" mind, and his opinion being once known, men did
" readily acquieſce in it; and it was very rarely ſeen,
" that any man attempted to bring it about again, and
" he that did ſo, did it upon great diſadvantages, and
" was always lookt upon as a very contentious per-
" ſon; ſo that what *Cicero* ſays of *Brutus*, did very
" often happen to him, *Etiam quos contra ſtatuit,*
" *æquos placatoſque dimiſit.*

" Nor did men reverence his judgment and opinion
" in courts of law only; but his authority was as great
" in courts of equity, and the ſame reſpect and ſub-
" miſſion was paid him there too; and this appeard
" not only in his own court of equity in the Exche-
" quer-chamber, but in the Chancery too, for thither

" he was often called to adviſe and aſſiſt the lord chan-
" cellor, or lord keeper for the time being; and if
" the cauſe were of difficult examination, or intri-
" cated and entangled with variety of ſettlements, no
" man ever ſhewed a more clear and diſcerning judg-
" ment: If it were of great value, and great perſons
" intereſted in it, no man ſhewed greater courage and
" integrity in laying aſide all reſpect of perſons:
" When he came to deliver his opinion, he always
" put his diſcourſe into ſuch a method, that one part
" of it gave light to the other, and where the pro-
" ceedings of Chancery might prove inconvenient to
" the ſubject, he never ſpared to obſerve and reprove
" them: And from his obſervations and diſcourſes, the
" Chancery hath taken occaſion to eſtabliſh many of
" thoſe rules by which it governs it ſelf at this day.

" He did look upon equity as a part of the com-
" mon Law, and one of the grounds of it; and there-
" fore as near as he could, he did always reduce it to
" certain rules and principles, that men might ſtudy it
" as a ſcience, and not think the adminiſtration of it
" had any thing arbitrary in it. Thus eminent was this
" man in every ſtation, and into what court ſoever he
" was called, he quickly made it appear, that he de-
" ſerved the chief ſeat there.

" As great a lawyer as he was, he would never ſuffer
" the ſtrictneſs of law to prevail againſt conſcience;
" as great a chancellor as he was, he would make uſe
" of all the niceties and ſubtilties in law, when it
" tended to ſupport right and equity. But nothing
" was more admirable in him, than his patience: He
" did not affect the reputation of quickneſs and diſ-
" patch, by a haſty and captious hearing of the coun-
" ſel: He would bear with the meaneſt, and gave eve-
" ry man his full ſcope, thinking it much better to loſe
" time than patience: In ſumming up of an evidence

" to a jury, he would always require the bar to inter-
" rupt him if he did miſtake, and to put him in mind
" of it, if he did forget the leaſt circumſtance; ſome
" judges have been diſturbed at this as a rudeneſs,
" which he always look'd upon as a ſervice and re-
" ſpect done to him.

" His whole life was nothing elſe but a continual
" courſe of labour and induſtry, and when he could
" borrow any time from the public ſervice, it was
" wholly employd either in philoſophical or divine
" meditations, and even that was a public ſervice too,
" as it hath proved; for they have occaſiond his wri-
" ting of ſuch treatiſes as are become the choiceſt
" entertainment of wiſe and good men, and the world
" hath reaſon to wiſh that more of them were print-
" ed: He that conſiders the active part of his life,
" and with what unwearied diligence and application
" of mind he diſpatched all mens buſineſs, which
" came under his care, will wonder how he could find
" any time for contemplation: He that conſiders again
" the various ſtudies he paſt thro, and the many col-
" lections and obſervations he hath made, may as
" juſtly wonder how he could find any time for ac-
" tion: But no man can wonder at the exemplary pie-
" ty and innocence of ſuch a life ſo ſpent as this was,
" wherein as he was careful to avoid every idle word,
" ſo it is manifeſt he never ſpent an idle day. They,
" who came far ſhort of this great man, will be apt
" enough to think that this is a panegyric, which in-
" deed is a hiſtory, and but a little part of that hiſto-
" ry which was with great truth to be related of him.
" Men, who deſpair of attaining ſuch perfection, are
" not willing to believe that any man elſe did ever ar-
" rive at ſuch a height.

" He was the greateſt lawyer of the age, and might
" have had what practice he pleaſed, but tho he did

" moſt conſcientiouſly affect the labours of his profeſ-
" ſion, yet at the ſame time he deſpiſed the gain of
" it, and of thoſe profits which he would allow him-
" ſelf to receive, he always ſet apart a tenth peny for
" the poor, which he ever diſpenſed with that ſecre-
" cy, that they who were relieved, ſeldom or never
" knew their benefactor: He took more pains to avoid
" the honours and preferments of the gown, than
" others do to compaſs them. His modeſty was be-
" yond all example, for where ſome men who never
" attaind to half his knowledge, have been pufft up
" with a high conceit of themſelves, and have affect-
" ed all occaſions of raiſing their own eſteem by de-
" preciating other men, he on the contrary was the
" moſt obliging man that ever practiſed: If a young
" gentleman happend to be retaind to argue a point
" in law, where he was on the contrary ſide, he
" would very often mend the objections when he
" came to repeat them, and always commend the gen-
" tleman, if there were room for it, and one good
" word of his was of more advantage to a young man,
" than all the favour of the court could be ".

Upon the promotion of lord chief juſtice *Rainſford*, who ſucceeded him in that office, the then lord chancellor expreſt himſelf thus, (*i*) " The vacancy of
" the ſeat of the Chief Juſtice of this court, and that
" by a way and means ſo unuſual, as the reſignation
" of him, that lately held it, and this too proceed-
" ing from ſo deplorable a cauſe as the infirmity of
" that body, which began to forſake the ableſt mind
" that ever preſided here, hath filled the kingdom
" with lamentations, and given the king many and
" penſive thoughts how to ſupply that vacancy a-
" gain, " and then addreſſing himſelf to his ſucceſſor,
" the very labours of the place, and that weight and
" fatigue

(*i*) *Burnet p.* 213, 217.

" fatigue of buſineſs, which attends it, are no ſmall
" diſcouragements; for what ſhoulders may not juſtly
" fear that burden, which made him ſtoop, that went
" before you? Yet I confeſs you have a greater diſ-
" couragement than the mere burden of your place;
" and that is the unimitable example of your prede-
" ceſſor; *Oneroſum eſt ſuccedere bono principi* was the
" ſaying of him in the panegyric, and you will find
" it ſo too, that are to ſucceed ſuch a chief juſtice,
" of ſo indefatigable an induſtry, ſo invincible a pa-
" tience, ſo exemplary an integrity, and ſo magnani-
" mous a contempt of wordly things, without which
" no man can be truly great, and to all this a man that
" was ſo abſolute a maſter of the ſcience of the law,
" and even of the moſt abſtruſe and hidden parts of
" it, that one may truly ſay of his knowledge of the
" law, what St. *Auſtin* ſaid of St. *Hierom's* knowledge
" in divinity, *Quod Hieronymus neſcivit, nullus morta-*
" *lium unquam ſcivit.* And therefore the king would
" not ſuffer himſelf to part with ſo great a man, till
" he had placed upon him all the marks of bounty
" and eſteem, which his retired and weak condition
" was capable of [p].

To this the new chief juſtice, ſpeaking of his prede-ceſſor, anſwerd in the following words.

" —— A perſon in whom his eminent virtues and
" deep learning have long managed a conteſt for the
" ſuperiority, which is not decided to this day, nor
" will it ever be determined I ſuppoſe, which ſhall
" get the upperhand: A perſon that has ſat in this
" court many years, of whoſe actions there I have
" been an eye and ear witneſs, that by the greatneſs
" of his learning always charmed his auditors to reve-
" rence and attention: A perſon of whom I think I
" may boldly ſay, that as former times cannot ſhew
" any ſuperior to him, ſo I am confident ſucceeding

" and future time will never ſhew any equal. Theſe " conſiderations heightend by what I have heard from " your lordſhip concerning him made me anxious and " doubtful, and put me to a ſtand how I ſhould ſuc- " ceed ſo able, ſo good, and ſo great a man: It doth " very much trouble me, that I, who in compariſon " of him am but like a candle lighted in the ſun- " ſhine, or like a glow-worm at mid-day, ſhould ſuc- " ceed ſo great a perſon, that is and will be ſo emi- " nently famous to all poſterity, and I muſt ever wear " this motto in my breaſt to comfort me, and in my " actions to excuſe me,

" *Sequitur, quamvis non paſſibus æquis.*

Mr. *Baxter*, with whom our author was very intimate towards the latter part of his life, deſcribes him in theſe words (*k*), " Sir *Matthew Hale*, that unwearied " ſtudent, that prudent man, that ſolid philoſopher, " that famous lawyer, that pillar and baſis of juſtice, " who would not have done an unjuſt act for any word- " ly price or motive, the ornament of his majeſty's go- " vernment, and honour of *England*, the higheſt fa- " culty of the ſoul of *Weſtminſter-Hall*, and pattern to " all the reverend and honourable judges; That godly " ſerious practical chriſtian, the lover of goodneſs and " all good men, a lamenter of the clergies ſelfiſhneſs " and unfaithfulneſs and diſcord, and of the ſad divi- " ſions following hereupon, an earneſt deſirer of their " reformation, concord, and the church's peace, and " of a reformed act of uniformity, as the beſt and ne- " ceſſary means thereto; That great contemner of the " riches, pomp and vanity of the world; That pattern " of honeſt plainneſs and humility, who while he " fled from the honour, that purſued him, was yet " Lord Chief Juſtice of the King's-bench, after being

(*k*) *Baxter*'s notes on Lord *Hale*'s life, *p.* 43.

" long Lord Chief Baron of the Exchequer; living " and dying, entring on, using, and voluntarily sur- " rendring his place of judicature with the most uni- " versal love, honour and praise, that ever did *English* " subject in this age, or any that just history doth ac- " quaint us with, *&c. &c. &c.*"

Thus far for the author.

As to the work it self, if any of our author's performances might challenge the precedence of the rest, this seems to have the justest claim to it, as being a favourite work, which he often reviewd, and was at vast pains and charge in furnishing himself with proper materials for.

His compassionate concern for the lives and liberties of mankind on the one hand and for preserving the public peace and tranquillity on the other had possest him with an opinion of the high importance, that the pleas of the crown, especially those relating to capital offenses, should be reduced to certain rules, and those rules clearly and plainly understood, that so there might be as little room left as possible either for erring in or perverting of judgment.

It was this led him to make the crown-law his principal study, to which he applied himself with great assiduity, for as bishop *Burnet* speaking of this treatise informs us (*l*), " It was by much search and long " observation he composed that great work concern- " ing it ". The same author acquaints us (*m*), that he had begun his collections relating hereto in the reign of King *Charles* I. " but after the king was mur- " derd he laid them by, and that they might not fall " into ill hands, he hid them behind the wainscotting " of his study, for he said, *there was no more occasion* " *to use them, till the king should be again restored to*

(*l*) *p.* 90. (*m*) *p.* 39.

" *his right*, and ſo upon his majeſty's reſtoration he " took them out, and went on in his deſign to perfect " that great work."

Hence it appears highly probable, that he intended this work for the public, altho the buſineſs of his ſtation did not afford him leiſure to publiſh it during his life; however about four years after his death the houſe of Commons took ſingular notice of it, and thought it a work of ſuch conſequence, as to paſs a vote (*n*) deſiring his executors to print it, and appointed a committee to take care thereof, but that parliament being ſoon after diſſolved (*o*) this deſign dropt.

Some years ſince there was publiſhed a treatiſe, intitled, *Pleas of the Crown by Sir* Matthew Hale, but this was only a plan of this work, containing little more than the heads or diviſions thereof, concerning which the editor in his preface expreſſes himſelf thus, " He [our author] hath written a large work up- " on this ſubject, intitled, *An Hiſtory of the Pleas of* " *the Crown*, wherein he ſhews what the law anciently " was in theſe matters, what alterations have from " time to time been made in it, and what it is at this " day; He wrote it *on purpoſe to be printed*, finiſhed " it, had it all tranſcribed *for the preſs* in his life-time, " and had reviſed part of it after it was tranſcribed."

It is therefore to be hoped, the publication hereof will not be thought any way to interfere with the direction of his will, *That none of his MSS ſhould be printed after his death, except ſuch as he ſhould give order for during his life*, his intention for printing it being ſo apparent, as may well amount to an order for ſo doing.

Beſides as biſhop *Burnet* obſerves (*p*), this prohibitory clauſe in the will ſeems in ſome meaſure to be revoked by his codicil, wherein he orders, *that if any book*

(*n*) *Nov.* 29. 1680. (*o*) *Jan.* 18. 1680. (*p*) *p.* 185.

book of his writing ſhould be printed, then what ſhould be given as a conſideration for the copy ſhould be divided, &c. a kind of implication, that he had left the printing thereof to the diſcretion of his executars.

The abovementiond writer further obſerves (*q*), that his unwillingneſs to have any of his works printed after his death proceeded from an apprehenſion, leſt they ſhould undergo any expurgations or interpolations in the licenſing them, for *this*, he ſaid, *might in matters of law prove to be of ſuch miſchievous conſequence, that he was reſolved none of his writings ſhould be at the mercy of the licenſers.*

But as there is no ſuch thing required by the laws now in being, that reaſon is at an end, and the reader may be aſſured that the edition here offerd to the publick is printed faithfully from the author's original manuſcript.

This manuſcript conſiſts of one thick folio volume all in our author's own hand-writing, from whence it was tranſcribed in his life-time, and the tranſcript has ſince been bound up in ſeven ſmall volumes in folio.

It had been by him reviſed as far as *Chap.* 27. in the firſt part, *viz.* about the middle of the third volume, as appears from many interlineations and additions in his own hand; the corrections in the remaining part are in another (very modern) hand, and in ſome places not very agreeable to the ſcope of the argument.

This tranſcript therefore ſo far as reviſed and corrected by our author (and no farther) may be deemed the original finiſhed and perfected, but ſince even in this part there are in ſome places leaves taken out and others inſerted in their room in a different hand, unauthenticated by our author, and ſometimes quite diſturbing the coherence and connexion of the diſ-

(*q*) *p.* 186.

courſe, it was not thought warrantable to conſider ſuch interpolations as a part of this treatiſe, for as it cannot be doubted but great regard will be always paid to the performance of ſo eſteemd an author, it is a piece of juſtice due both to the author and the public, that nothing ſhould be herein inſerted, but what is undeniably his, and carries evident marks of being by him intended as part of this work.

The title hereof was named by our author himſelf *Hiſtoria Placitorum Coronæ*, for he intended, as appears from the *Proemium*, to have taken in the whole body of the crown-law, as well in relation to matters civil, as matters criminal, for which purpoſe he once deſigned to have added two more books upon this ſubject, the one concerning offenſes not capital, the other touching franchiſes and liberties, but to the great detriment of the public neither of theſe appears ever to have been compoſed by him, ſo that as it now ſtands it treats only of offenſes capital, which is indeed the moſt important branch of the crown-law, being what moſt nearly affects the life and liberty of the ſubject; beſides in treating hereof he has unavoidably explaind many incidental matters equally applicable to offenſes not capital.

The *firſt* part of this work relates to the nature of the offenſes, *viz.* the ſeveral kinds of *treaſon*, *hereſy* and *felony*; the ſecond of theſe, hereſy, being an offenſe of a ſpiritual nature, of which it was not our author's purpoſe to treat, was at firſt wholly omitted by him, but afterwards conſidering, as I ſuppoſe, that by its being circumſcribed by act of parliament, *viz.* 1 *Eliz.* it became an offenſe of temporal cognizance, he thought proper to inſert a chapter upon that head.

The *ſecond* part relates to the manner of proceeding againſt offenders, wherein are conſiderd the juriſ-

diction of the ſeveral courts, the manner of apprehending, committing, bailing, and arraigning offenders, their ſeveral pleas, bringing them to trial, judgment, and execution.

Having thus given ſome general account of the author and the work, it will be proper in the next place to acquaint the reader with the part I have had in this edition, which has been to ſuperviſe the printing thereof that it be agreeable to our author's manuſcript, which being written in a very obſcure hand might by one wholly unacquainted with the law have been frequently miſtaken.

To make this work the more authentic the ſeveral references herein made to the records have been compared with the originals at the reſpective offices in the *Tower* and *Weſtminſter*.

I have alſo carefully examined the ſeveral quotations from the year-books, reports, *&c.* many of which being quoted without folio or page or elſe miſ-quoted have with no ſmall trouble been ſupplied and rectified, for our author not having always had leiſure to conſult the books themſelves has frequently copied from the miſ-printed quotations in the margin of lord *Coke's* third volume of his Inſtitutes.

As it cannot be expected but in the writing ſo large a manuſcript ſome words muſt *currente calamo* have been omitted or wrong written, I have in ſome few places taken the liberty to add or alter a word or two to preſerve the ſenſe, but have been particularly careful to diſtinguiſh ſuch addition or alteration within crotchets, that I might not impoſe my judgment on the reader, but leave him to judge for himſelf, whether the drift of our author's reaſoning do not require it.

I have likewiſe ſubjoind a few notes containing ſome obſervations from the records, as alſo remarking, where the law hath been ſince explaind by later reſolutions, or alterd by ſubſequent acts of parliament; but as theſe acts are ſometimes very long, conſiſting of many clauſes, the reader is deſired to uſe the ſame caution here, which is recommended by our author (*r*) with regard to thoſe recited in the work it ſelf, *viz.* "that he rely not barely upon the abſtracts thereof "here given, but peruſe the ſtatutes themſelves in the "books at large."

I am ſenſible many ſlips and omiſſions muſt needs have happend in the ſuperviſing ſo large a work of ſo critical a nature, but hope that will plead my excuſe, at leaſt to thoſe, who conſider the wide difference between peruſing it in a fair print and in a difficult manuſcript.

(*r*) *Part* I. *p.* 261.

March 30. 1736. *S. Emlyn.*

CORRI-

CORRIGENDA.

Page	
23.	*in notis, col. 2. l. 10. after cap. 1. r.* as it is there printed.
52.	*in notis, for* Bartholinus *r.* Bartholus.
51.	*in notis, l. ult. for* 33 *r.* 42.
57.	*l. 24. for* scire *r.* sciri.
68.	*l. 16. for* him *r.* himself.
103.	*in notis, col. 2. l. 9. for* posſion *r.* poſſeſſion.
126.	*l. 27. for* a certain eſtate *r.* no certain eſtate.
	l. 30. for E. 2. *r.* E. 3.
	l. penult. for 3. *r.* 4.
177.	*l. 1. r.* anno regni ſui decimo.
180.	*in notis, col. 2. l. 32. for* Rot. part. *r.* Rot. parl.
215.	*in notis, col. 1. l. ult. r.* other foreign coin.

Page	
284.	*l. 8. from bot. for* 36. *r.* 16.
293.	*l. penult. in notis, for* broke *r.* ſcraped out of.
372.	*in notis, col. 2. l. ult. for* miſſion *r.* miſpriſion.
394.	*l. 3. at beginning r.* II.
395.	*l. 8. for* II. *r.* III.
401.	*l. 22. at beginning r.* IV.
402.	*l. 6. dele* IV.
447.	*in notis, col. 1. l. 2. for* Lib. *r.* Leg.
554.	*in notis, col. 2. l. ult. for* 3 & 4 W. & M. cap. 9. *r.* 12 Ann. cap. 7. if of the value of 40*s.*
563.	*l. 17. for* Eliz. *r.* E. 6.
701.	*col. 2. l. 17. r.* of the court.

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THE PROEMIUM.

The Method of the Work intended.

HAVING an intention to make a full collection of the *Pleas of the Crown*, I ſhall divide thoſe pleas into two general tracts.

The *firſt* concerning pleas of the crown in matters *criminal*.

The *ſecond* concerning pleas of the crown in matters *civil*, namely concerning franchiſes and liberties.

The former will be the ſubject of the firſt and ſecond books, the latter of the third book.

Firſt therefore, I ſhall begin with the ſeveral kinds of *crimes*, that make up the ſubject matter of my firſt and ſecond book.

Crimes that are puniſhable by the laws of *England* are for their matter of two kinds.

1. *Eccleſiaſtical.*
2. *Temporal.*

The *former* of theſe, namely ſuch crimes as I call *Eccleſiaſtical*, are of eccleſiaſtical cognizance, and tho all external juriſdiction, as well eccleſiaſtical as temporal, is derived from

the crown of *England*, and all criminal proceedings in the eccleſiaſtical courts are in ſome kind *Placita coronæ*, ſuits for the king, and ſuch as he may pardon or diſcharge, as being his own ſuits, yet theſe I ſhall not meddle with at this time.

The *ſecond* ſort, *viz. Temporal* crimes, which are offenſes againſt the laws of this realm, whether the common law or acts of parliament, are divided into two general ranks or diſtributions in reſpect of the puniſhments, that are by law appointed for them, or in reſpect of their nature or degree; and thus they may be divided into capital offenſes, or offenſes only criminal; or rather and more properly into

Felonies and
Miſdemeanors,

becauſe there is no capital offenſe but hath in it the crime of felony, and yet there be ſome felonies, that are not in their nature capital, whereof hereafter.

Crimen capitale, or felony in this acceptation is of two kinds, namely

That which is complicated, and hath a greater offenſe joined with it, namely *Treaſon*, and

That which is ſimply *Felony*.

Touching the former of theſe, namely *Treaſon*, it is that capital offenſe, which is committed againſt ſome ſpecial civil obligation of ſubjection and faith more than is found in other capital offenſes, and therefore it hath the denomination of *proditio*, and the offenſe is laid to be done *proditorie*.

This offenſe of *Treaſon* is of two kinds, namely

That which is againſt the higheſt civil obligation, namely againſt the king, his crown and dignity, which is called *High-treaſon*,

Or againſt ſome other, to whom a civil obligation of faith is made or implied, which is called *Petit-treaſon*.

The offenſes of high-treaſon are of two kinds, *viz.*

Such as were treaſons by the *common law*, or

Such as were made ſo by ſpecial *acts of parliament*.

The offenſes of ſimple felony are likewiſe of the ſame diſtribution, namely

Such as are by the *common law*, or

Such as are specially made punishable as misdemeanors by act of parliament.

This is the general order and distribution of the first and second book of this tractate, namely concerning the matters of the pleas of the crown in criminals, or those crimes, which come under the cognizance of the laws of this kingdom, wherein the prosecution is *pro rege*, or in his name or right, as the common *vindex* of public injuries or crimes.

The particular enumeration of these several offenses is much of the business of those charges, that are given to the grand jury by the justices in their several sessions; and they were for the most part heretofore contained in certain articles or heads of inquiry deliverd out in writing to the several inquests, and were often styled *Capitula placitorum coronæ*, such were those of *R.* 1. mentiond by *Hoveden p.* 744, 783. which were deliverd to the inquisitors in every wappentach or hundred, and to the justices itinerant to make inquiry upon, and by them to the grand inquests; and such were those *Articuli itineris* declared by *Bracton*, *Lib.* III. *de coronâ*, *cap.* 1. and printed in the old *Magna Carta* for the justices in *eyre* to make inquiry upon, which I shall not here repeat at large, but shall take them up as I shall have occasion to use them.

The order, which I shall observe in these *Pleas of the crown* will be this:

I. In the first book I will consider of *capital* offenses, *Treasons* and *Felonies*, which book will be divided into two parts,

1. The

The PROEMIUM.

1. The *enumeration of the kinds of misdemeanors* [illegible]
as well by common law, as by [illegible]
2. The whole *method of proceedings* in or [illegible]

II. The second book will treat of matters criminal, that are *not capital*; and

III. The third book will be touching *forfeiture*, and *pleas of the crown*.(*)

(*) That which is here offered to the public is only the first of these books, consisting of two parts; the other two [illegible] being, as I have been credibly informed, never been compiled by any author.

HISTO-

HISTORIA
PLACITORUM CORONÆ.

PART I.

CAP. I.

Concerning Capital Puniſhments.

BEING to treat concerning capital offenſes, it will not be amiſs to premiſe ſomething touching capital puniſhments.

Laws, that are introduced by cuſtom, or inſtituted by the legiſlative authority for the good of civil ſocieties, would be of little effect, unleſs they had alſo their ſanctions, impoſing penalties upon the offenders of thoſe laws.

Theſe penalties are various according to the ſeveral natures of the offenſes, or the detriment that comes thereby to civil ſocieties; ſome are only pecuniary; ſome corporal, but not capital, ſuch as impriſonment, ſtigmatizing, baniſhment, ſervitude, and the like; others are capital, *ultimum ſupplicium*, or death; and that death ſometimes accompanied with greater, ſometimes with leſs degrees of ſeverity.

So that, altho offenſes againſt the good of human ſociety be many of them prohibited by the laws of God and nature, yet the puniſhments of all ſuch offenſes are not determined by the law of nature to this or that particular kind, but are for the moſt part, if not altogether, left to the poſitive laws and conſtitutions of ſeveral kingdoms and ſtates.

And therefore, altho moſt certainly the penalties inſtituted by God himſelf among his antient people upon the breach of their laws were with the higheſt wiſdom fitted to that ſtate, and all laws and inſtituted puniſhments ſhould come up as near to that pattern, as may be; yet as to the degrees and kinds of puniſhments of offenſes *in foro civili vel judiciario* they are not obliging to all other kingdoms or ſtates, but all ſtates, as well chriſtian as heathen, have varied from them.

And therefore it will not be amiſs to inſtance in the various kinds of puniſhments inflicted by the ſeveral laws of ſeveral countries, eſpecially in thoſe two offenſes of *homicide* and *theft*, which are the moſt common and obvious offenſes in all countries.

By the antienteſt divine law, that we read, the puniſhment of homicide was with death. *Gen.* ix. 6. *Whoſoever ſheds man's blood, by man ſhall his blood be ſhed.* (a)

And the judicial law given by *Moſes* was purſuant to it, with ſome temperaments and explanations. *Exod.* xxi. 12, 13, 14. *He, that ſmiteth a man, ſo that he die, ſhall ſurely be put to death. And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place, whither he ſhall flee. But if a man come preſumptuouſly upon his neighbour to ſlay him with guile; thou ſhalt take him away from mine altar, that he may die.* And *v.* 18, 19. *And if men ſtrive together, and one ſmite another with a ſtone, or with his fiſt, and he die not, but keepeth his bed; if he riſe again, and walk abroad upon his ſtaff, then ſhall he, that ſmote him, be quit; only he ſhall pay for the loſs of his time, and for his cure.*

And what this delivery by God of a man into his neighbour's hand is, is beſt expounded *Deut.* xix. 4, 5, 6, 11, 12. *Whoſo killeth his neighbour ignorantly, whom he hated not in time paſt, As where a man cleaveth wood, and the ax ſlieth from the helve, and killeth a man, he ſhall fly to the city of refuge* (b), *leſt the*

(a) This law being given to *Noah*, from whom all men are derived, is not peculiar to the *Iſraelites*; but, as our author obſerves below, is binding on all mankind.

(b) Concerning theſe cities of refuge, ſee *Exod.* xxi. 13. *Numb.* xxxv. *Deut.* iv. 41. & *ſeq.* *Joſh.* xx, xxi. *Selden: de jure naturali, &c. Lib.* IV. *cap.* 2.

the avenger (c) *of blood purſue, and ſlay him while his heart is hot; whereas he was not worthy of death, in that he hated him not in time paſt: But if any man hate his neighbour, and lie in wait for him, and riſe up againſt him, and ſmite him mortally, that he die, and he fleeth to one of thoſe cities, the elders of his city ſhall ſend and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die.* (d)

Again; *Exod.* xxii. 2. *If a thief be found breaking up, and be ſmitten, that he die, there ſhall no blood be ſhed for him: if the ſun be riſen upon him, there ſhall blood be ſhed for him; for he ſhould make full reſtitution; if he have nothing, then he ſhall be ſold for his theft.*

Upon theſe judicial laws, theſe things are obſervable; 1. that by theſe laws the killing of a man by malice forethought, or upon a ſudden falling out, were both under the ſame puniſhment of death. (e) 2. That the killing of a man by

(c) Who this avenger of blood was, is no where expreſly ſaid, it is generally ſuppoſed that he was the next heir to the perſon ſlain. See *Selden: de jur. nat. Lib.* IV. *cap.* 1. *& de ſucceſſionibus in bona defunctî*: but the truth is, the Hebrew words *Goel ha dam*, here render'd *the avenger of blood*, ſhould be render'd *the next of blood*, for *Goel* properly ſignifies one of *the ſame kindred*; it is ſo render'd *Ruth* II. 20. and III. 9, 12. and is uſually expreſſed in the ſeptuagint by ἀγχιστεύς, which denotes *one near of kin.*

(d) If there was no avenger of blood; or if he would not or could not kill the ſlayer, the ſlayer was capitally puniſhed by a judicial ſentence; and no ranſom or recompence was admitted. *Numb.* xxxv. 31. *Selden: de jur. nat. Lib.* IV. *cap.* 1. *in fine*; even tho the perſon ſlain ſhould before his death deſire that the ſlayer ſhould be forgiven. *Maimonides More Nevochim, Pars* III. *cap.* 41. for all voluntary homicide was inexpiable, as appears from *Numb.* XV. 27.—31. and the caſe of *David* in the matter of *Uriah*, *Pſal.* LI. 16. there was one caſe indeed of capital homicide, wherein a ranſom was allowed, *viz.* If an ox were wont to puſh with his horn, and it had been teſtified to his owner, and he had not kept him in, ſo that he had killed a man or a woman, the owner was to be put to death, he being look'd on as the author of the murder, who would not prevent it, when he had warning, and might have done it; however, this being a caſe of groſs negligence, rather than wilful malice, he was permitted to redeem his life by paying the ranſom, which was laid upon him *Exod.* xxi. 29, 30. The price of a ſervant was thirty ſhekels of ſilver. *Ibid.* v. 32. and that of a freeman was generally double, *viz.* ſixty ſhekels. *Maimon. More Nevochim, Pars* III. *cap.* 40.

This was alſo felony by the common law of *England*, for by ſuch ſufferance the owner ſeem'd to have a will to kill. *Stanf. P. C.* 17. *Fitz. Cor.* 311.

(e) The law was general; *That whoever ſmiteth a man, ſo that he die, ſhall ſurely be put to death. Exod.* xxi. 12. There were indeed ſome exceptions from this general law; but, ſetting aſide the caſe of an houſe breaker in the night, they all related to caſual involuntary homicides; there is not one exception of a voluntary deſigned killing, whether ſudden or premeditated, (whatever interpretations might be afterwards made by the *Jewiſh Rabbi's*, who made the commandments of God of none effect thro' their traditions.

by misfortune was not liable to the puniſhment of death, by the ſentence of the judge; but yet the avenger of blood might kill him, before he got to the city of refuge. (*f*) 3. The killing of a thief in the night was not liable to puniſhment of death; but if it were in the day-time, it was puniſhable with death. 4. Tho there is no expreſs law touching killing a man in his own defenſe (*g*), yet it ſeems the cuſtom of the *Jews*, and the interpretation of the *Jewiſh* doctors, excuſed that fact from the puniſhment of death. (*h*) 5. That the uſual manner of the execution of the ſentence of death was ſtoning, and ſometimes ſtrangulation. (*i*)

Now I will conſider ſome of the laws of other nations in reference to *homicide*; wherein tho there is a great analogy in many things between the laws of the *Jews*, and the laws of other countries; ſo that a man may reaſonably collect, that theſe judicial laws of the *Jews* were taken up by other nations, as the grand exemplar of their judicial laws; yet in ſome things they departed from them in the particular conſtitutions and cuſtoms of other countries.

Among the *leges Atticæ* collected by Mr. *Petit Lib.* VII. *tit.* 1. theſe were many of the laws concerning homicide.

1 *Senatus*

traditions. *Mat.* xv. 6.) ſo that there is nothing in the *Jewiſh* law to countenance the diſtinction made by the laws of *England* between murder and manſlaughter, a diſtinction, which ſerves to ſhew, that tho the laws of *England* be much ſeverer than the other in the caſe of *theft*, yet they are much milder in the caſe of *homicide*.

(*f*) Unleſs he fled to the altar, which was alſo look'd on as a place of refuge, it being probable from *Exod.* xxi. 13, 14. that the altar was the place of refuge before the cities of refuge were appointed. See *Selden: de jur. nat. Lib.* IV. *cap.* 2. If he did eſcape to the city of refuge, he was obliged to remain there till the death of the high prieſt, for the avenger of blood might kill him, wherever he found him out of the borders of the city. *Numb.* xxxv. 25.---32. *Selden: ubi ſupra & de Synedriis. Lib.* II. *cap.* 7. but after the death of the high prieſt, he was at liberty to go where he would; for the reaſon hereof ſee *Maimonides More Nevochim, Pars* III. *cap.* 40. and *Ainſworth* on *Numbers* xxxv. 25.

(*g*) This was a caſe ſo plainly juſtifiable by the law of nature, that it needed no poſitive law; however, the permiſſion to kill a thief, who ſhould be found breaking up in the night, ſeems to be an expreſs allowance of killing in one's own defenſe; for the reaſon of that law is manifeſtly founded on the principle of ſelf-preſervation. *Nam adverſus periculum naturalis ratio permittit ſe defendere. Digeſt, Lib.* 9. *Tit.* 2. *l.* 4.

(*h*) When done in defenſe of life or chaſtity; becauſe, when loſt, they are irreparable. See *Selden: de jur. natur. Lib.* IV. *cap.* 3. *Maimon. More Nevochim, Pars* III. *cap.* 40.

(*i*) Sometimes the execution was by *burning*; as in the caſe of a prieſt's daughter, who had played the whore. *Levit.* xxi. 9. Sometimes by *decollation*, which was the uſual way for murder. *Selden: de Synedriis, Lib.* II. *cap.* 13. *De jur. natur. Lib.* IV. *cap.* 1.

Senatus Areopagiticus jus dicito de cæde, aut vulnere, non caſu, ſed voluntate inflicto; de incendio item, & malo veneno hominis necandi cauſa dato.

Theſmotheta in homicidas animadvertunto.

Si quis hominem ſciens morti duit, capital eſto.

Qui alium caſu fortuito necâſſit, in annum deportator, donec aliquem è cognatis occiſi placâris; revertitor vero peractis ſacris, & luſtrationibus.

Si quis imprudens in certaminibus alium necâſſit, aut inſidiantem aut ignotum in prælio, aut in uxore, vel matre, vel ſorore, vel filia, vel concubinâ, vel eâ, quam in ſuis liberis habet, deprehenſum, cædis ergo ne exulato.

Si quis alium injuſte vim inferentem incontinenti necâſſit, jure cæſus eſto.

Si quis homicidam fori, urbis territorio, publicis certaminibus, & ſacris Amphictyonicis abſtinentem occiderit, aut mortis cauſam prebuerit, perinde ac ſi Athenienſem civem necâſſit, capital eſto, & Epheta jus dicunto. So that by this law a man conſcious to himſelf of homicide might, before he was apprehended, undertake a voluntary exile, and during ſuch an exile was privileged from the penalty of homicide. (*k*)

Homicidas morte multanto in patria occiſi terra, & abducunto, ut lege cautum eſt; in eos ne ſeviunto, neve pecuniam (*l*) *exigunto.*

Before judgment the kindred of the party ſlain that proſecuted the manſlayer might compound the offenſe, and releaſe the offender, but after judgment once given, neither the judge nor proſecutor could remit it. (*m*)

Cædis ne poſtulator unquam is qui homicidam exulantem & redeuntem quo non licet, in jus ad magiſtratum rapuerit aut detulerit.

(*k*) This was the caſe of *Tlepolemus* in *Homer Odyſſ.* a. v. 224, 270. 4. v. 117.

(*l*) The *Greek* word ποινὴ here render'd *pecuniam*, properly ſignifies a ranſom, *Hom. Iliad.* a. v. 13, 20, 23, 95. for by the antient law of *Greece* the puniſhment of homicide was redeemable by the payment of a ſum of money to the relations of the ſlain, which recompence was term'd ποινὰ ἀνδρός. *Homer. Iliad.* 2. v. 628. e. v. 498.

(*m*) That this was the meaning of the foregoing law, ſee *Petit in leges Aticas Lib.* VII. *tit.* 1. *p.* 509. See alſo the oration of *Demoſthenes* againſt *Ariſtocrates*, wherein moſt of the *Athenian* laws relating to homicide are explained.

And *eodem libro tit.* 5. *si nox furtum faxit, si im aliquis occisit, jure cæsus esto,* according to the *Mosaical* law, and from thence transcribed into the *Attic* laws, and from thence by the *Decemviri* into the *Roman* laws of the twelve tables *in totidem verbis.*

Among the *Romans* the laws concerning homicide differed in some things both from the *Jews* and *Greeks*, as appears *Digest. Lib.* XLVIII. *tit.* 8. *Ad legem Corneliam de sicariis & veneficiis.*

Qui hominem occiderit punitor non habitâ differentiâ cujus conditionis hominem (n) *interemit.*

Qui hominis occidendi furtive faciendi causâ cum telo ambulaverit, (o), *qui hominem non occidit sed vulneravit ut occidat, ut homicida damnandus, nam si gladium strinxerit & cum eo percusserit, indubitatè occidendi animo admisit, sed si clavi aut cuccuma in rixa, quamvis ferro, percusserit, tamen non occidendi animo, lenienda pœna ejus, qui in rixa casu magis, quam voluntate, homicidium admisit.* (p)

But if it were merely by misfortune, it was not punished. (q)

Qui stuprum sibi vel suis per vim inferentem occidit, dimittendus est, (r) *sed is, qui uxorem in adulterio deprehensam occidit, humiliore loco positus in exilium perpetuum dandus, in aliquâ dignitate positus ad tempus relegandus.* (s)

Furem nocturnum qui occiderit, impune feret, si parcere ei sine periculo suo non potuit (t); which law, tho like to that of the *Jews* and *Greeks*, the *Roman* lawyers have construed (u), that it

(n) *l.* 1. §. 2.

(o) *l.* 1. *pr. & Cod. eod. tit. Lib.* IX. *tit.* 16. *l.* 7.

(p) *l.* 1. §. 3.

(q) *l.* 1. §. 3. *e.g.* If a man, who was cutting a tree, should without calling out throw down a great branch of it upon one who was passing by, and kill him, he was to be acquitted, that is to say, he was not to be proceeded against criminally by the *lex Cornelia de sicariis*; for so is the expression in *l.* 7. *ad hujus legis coercitionem non pertinet*; but still he was liable by the *lex Aquilia* to make a pecuniary satisfaction for the damage. *Justit. Lib.* IV. *tit.* 3. §. 5. and tho that law mentions only the case of killing a slave, yet there lay an *utilis actio* in the case of killing a freeman. See *Noods ad Leg. Aquil. cap.* 2.

(r) *l.* 1. §. 4.

(s) *l.* 1. §. 5.

(t) *l.* 9.

(u) This was not a meer construction of the *Roman* lawyers, but is expressly provided by the law of the twelve tables, as appears from *Digest. Lib.* IX. *tit.* 6. *ad leg. Aquil. l.* 4. §. 1. *Cic. pro Milone, cap.* 3. *A. Gell. Lib.* XI. *cap.* 18. *Macrob. Saturnal. Lib.* I. *cap* 4. The reason of this distinction between a night-thief and a day-thief, see in *Grot. de jur. bel. ac pac. Lib.* II. *cap.* 1. §. 12.

it is lawful to kill *furem nocturnum recedentem & fugientem cum rebus, licet ſe non defendat telo, ſed non diurnum, niſi ſe defendat telo.*

The puniſhment of homicide, unleſs it were meerly caſual, among the *Romans* was *deportatio in inſulas & omnium bonorum ademptio, ſed ſolent hodie capite puniri, niſi honeſtiore loco poſiti fuerint, ut pœnam legis ſuſtineant; humiliores enim ſolent beſtiis ſubjici* (x); *altiores vero deportantur in inſulas.* (y)

Some temperaments they added in other caſes of homicide, as baniſhment for five years (z), deportation, &c. but regularly the puniſhment of homicide, unleſs in caſe of ſimple misfortune (a), or defenſe of life, (b) was death, *viz. beſtiis ſubjiciantur.*

Among the *Saxons* (c) the puniſhment of homicide was not always, nor for the moſt part capital; for it might be redeemed by a recompenſe which went under the name of *Wera* and *Weregild* (d), which was a rate ſet down upon the head

(x) *Dig. Lib.* XLVIII. *tit.* 19. *de pœnis. l.* 28. §. 15.

(y) *Dig. ad leg. Cornel de ſicariis, l.* 16.

(z) *l.* 4. §. 1.

(a) *Cod. eod. tit. l.* 1.

(b) *Cod. eod. tit. l.* 2 & 3.

(c) It ſeems to have been the general practice of moſt of the northern nations to commute the puniſhment of the moſt heinous crimes for a pecuniary mulct. *Lindenbrogii Codex Leg. Antiq. Lib.* IV. *cap.* 36. *Tacitus* ſpeaking of the antient *Germans* ſays, it was cuſtomary among them to puniſh homicide with a certain number of ſheep and oxen, out of which the relations of him that was ſlain received ſatisfaction. *Tac. de mor. Germ. cap.* 21. from hence probably our *Saxon* anceſtors brought the cuſtom into *Britain.*

(d) This *Weregild* or *capitis æſtimatio*, according to the laws of *Ethelbert*, was uſually 100 *ſ.* *Leg. Ethelbert. l.* 21. tho in ſome particular caſes it was more. *l.* 5. 6, 22. if the ſlayer eſcaped, the relations were to pay half the ordinary *Weregild*, *l.* 23.

By the laws of *Ina* the *Weregild* was different according to the rank and degree of the perſon killed, of a man worth 200 *ſ.* was 30 *ſ.* of a man worth 600 *ſ.* was 80 *ſ.* of a man worth 1200 *ſ.* was 120 *ſ.* *Leg. Ina, l.* 70. This rule admitted of ſome exceptions. *l.* 34. *l.* 74.

By the laws of *Alfred*, the bare attempt on the king's life was puniſhed with death, unleſs the offender redeemed it by the payment of the king's *weregild*; the ſame law was in caſe a ſlave attempted the life of his lord, unleſs he redeemed it by paying his lord's *weregild. Leg. Alfred. l.* 4. the *weregilds* were of the ſame value, as under *Ina. Leg. Alfred. l.* 9. *l.* 26.

By the league between *Alfred* and *Guthrun*, *l.* 2. the value of a common perſon was 200 *ſ.* the ſame by the league between *Edward* and *Guthrun in fine.*

By the laws of *Athelſtan*, whoever ſhould attempt his lord's life, was to be put to death; and there is no mention made of any ranſom. *Leg. Athelſtan, l.* 4. but at the end of his laws, and of the *Judicia Civitatis Lundoniæ*, there is a particular account of the *weregilds* of all orders and degrees, from the king to the peaſant; for which ſee *Wilkins's Leg. Anglo Sax. p.* 64. *p.* 71.

By

head of perſons of ſeveral ranks; and if any of them were kild, the offender was to make good that rate, or *Weregild* or *capitis æſtimatio*, to the kindred of the party ſlain; or, as ſome think, part to the king, part to the lord of the fee, and part to the relations of the party ſlain; which if he could not do, he was to ſuffer death (*e*). *Vide Spelm. in Gloſſ. ad verba Wera & Weregild.*

This cuſtom continued long, even to the time of *Hen.* I. here in *England*, as appears by his laws *in libro rubro, ſect.* 11. (*f*) but ſhortly after grew obſolete, as being too much contradictory to the divine law. (*g*) *Vide Covarr. Tomo* 2. *Lib.* II. *cap.* 9. *ſect.* 2.

But altho the cuſtom of *Weregild* is abrogated here in *England*, and by the laws of this kingdom the puniſhment of homicide

By the laws of *Ethelred*, *l.* 5. the *weregild* of a common perſon was increaſed to 25 pounds. By *l.* 8. *Gul. Conq. apud Wilkins*, *p.* 221. it was twenty Pounds.

By the laws of *Cnute*, whoever ſhould lie in wait for the life of the king, or of his lord, was to ſuffer death, and forfeit all he had. *Leges Cnuti*, *l.* 54. Whoever committed a public notorious murder, was likewiſe to ſuffer death without redemption; for in *l.* 61. *Cædes publica & domini proditio* are reckoned amongſt the *ſcelera inexpiabilia*; but it ſhould ſeem that common homicide was redeemable; for in *l.* 6. it is ſaid, *Homicidæ inclineut, vel emendent, vel ſcienter in peccatis moriantur.*

(*e*) The *weregild* was uſually divided into three parts; the firſt, which was called *Frith bore*, was paid to the king for the loſs of his ſubject; the lord had another for the loſs of his man, which was call'd *Man-bote*; and the kin of the ſlain for their loſs had the third part, which was call'd *Mog-bote*. See *Spelm.* life of *Alfred*, *Book* II. §. 11. in the caſe of killing the king, beſides the *weregild*, which was to be paid to the king's relations, there was alſo another payment call'd *cyn-bot* or *cynegild*, to be made to the publick for the loſs of their king.

(*f*) And 6. 12. ſee *Wilkin's leges Anglo Sax. p.* 244. But it appears from the ſame laws *l.* 71. *ibid. p.* 267. that a malicious murder, by poiſon or the like, was *factum mortiferum nullo modo redimendum*: The genuineſs of theſe laws is juſtly queſtioned, for that they not only are in the nature of commentaries rather than laws; but alſo in *l.* 5. *Gregory's* decretals are cited, which were not compiled till fifteen years after the death of *Henry* I. however, they are allow'd to be very antient, and to contain the uſages of the *Anglo-Saxons*. See *Hickeſii Differt. Epiſt. p.* 96.

(*g*) It cannot but ſeem ſtrange to us at this time of day, that the wilful murder of any one, much more of the king, ſhould be puniſhed only with a pecuniary mulct; to ſolve this difficulty, Mr. *Rapin* ſuppoſes that this commutation was allow'd only in the caſe of ſimple homicide; or at moſt what is now known by the name of manſlaughter, but not in the caſe of a premeditated murder: See *Rapin's Hiſtoire d'Angleterre*, *Vol.* I. *p.* 520. This notion is in it ſelf reaſonable, and ſeems to be favoured by *l.* 4. of *Athelſtan*, and *l.* 54. of *Cnute*, which make it capital barely *inſidiari regi vel domino*, much more to take away the life of the king or his lord; but on the other hand it ſeems ſomewhat hard to ſuppoſe that among ſo many laws againſt homicide, they ſhould all be level'd againſt caſual or ſudden killing only, and ſcarce any againſt wilful murder.

micide is regularly death (*b*), as ſhall hereafter be ſhewn; yet ſince there are in *England* two kinds of proceedings in puniſhing of homicide, the one at the ſuit of the heir or wife by appeal, the other at the ſuit of the king by indictment, the capital puniſhment of the offender may be diſcharged by all parties intereſted, namely by the appellant by releaſe, and by the king by his pardon.

And thus far touching the puniſhment of homicide.

Now I ſhall conſider ſomewhat alſo of the puniſhment of *theft*, and the various laws and uſages concerning the ſame in ſeveral kingdoms and ſtates, and at different times in the ſame ſtate or kingdom.

By the *Jewiſh* law, *Exod.* xxii. 1, 4. *If a man ſteal an ox or a ſheep, and ſell or kill it, he ſhall reſtore five oxen for an ox, and four ſheep for a ſheep: If the theft be found in his hands alive, whether ox, aſs or ſheep, he ſhall reſtore double*; and the like for other goods (*i*); ſo that there was no capital puniſhment in caſe of theft, tho it were accompanied with *burglary*, as breaking a houſe, (but men-ſtealers were puniſhed with death (*k*); but it ſeems by the civil conſtitutions of that ſtate the puniſhment thereof was ſometimes enhanſed, at leaſt in ſome circumſtances, ſometimes to a ſeven-fold reſtitution, *Prov.* vi. 31. and alſo to death. 2 *Sam.* xii. 5. (*l*)

Now as to the *Attic* laws: *Samuel Petit de Legibus Atticis, Lib.* VII. *tit.* 5. gives us an account of their laws concerning theft, in ſome things differing, in ſome things agreeing with the *Jewiſh* laws, *furem cujuſcunque modi furti ſupplicio capitis*

D *puniror.*

(*b*) The offender is to be hanged by the neck till he be dead; and in caſe he was convicted on an appeal, the antient uſage was, that all the relations of the ſlain ſhould drag him with a long rope to the place of execution. 3 *Co. Inſt.* 131. *Plowd.* 306. *b.* 11 *Hen.* 4. 12. *a.*

(*i*) *Exod.* xxii. 7, 9. The reaſon why the reſtitution of an ox was more than of a ſheep is ſuppoſed by *Maimonides more Nevochim Par.* III. *cap.* 41. to be, becauſe ſheep are more eaſily guarded againſt thieves than oxen, who feed at a greater diſtance one from another.

(*k*) *Exod.* xxi. 16.

(*l*) This paſſage from the book of *Samuel* does by no means prove what it is brought for, *viz.* that theft was puniſhable with death by the *Jewiſh* law; for the caſe there par of taking away a poor man's lamb, was attended with violence and other aggravating circumſtances, which provok'd king *David* to ſay, *The man that hath done this ſhall ſurely die*; and ſome render the words, *Does deſerve to die*; but at moſt it only proves the vehemence of *David*'s anger at the man, and not what was the law of the *Iſraelites*.

punito. This was *Draco's* law; but it was thought too ſevere, and therefore *Solon* corrected it (*m*), *Si furtum factum ſit, & quod furto perierat recuperit dominus, duplione luito furtum qui fecit & quorum ope conſilioque fecit; decuplione vendito fur, ni dominus rem furtivam receperit, in nervo quoque habeatur dies ſolis quinque totidemque noctes, ſi heliaſtæ pronunciarint; pronunciando autem, cum de pœna illius agitur.*

Si liceri furtum cujus æſtimatio ſit ſupra 50 drachmas faxit, ad undecim viros rapitur; ſi vox furtum faxit, ſi im aliquis occiſit, jure cæſus eſto. — *Manifeſtum hujuſmodi furtum qui faxit, etiamſi vadem dederit, non noxa facta ſarcitione, ſed morte luito. Si quis item ex aliquo gymnaſio veſtis aut lecythi aut alicujus vel minimæ rei, aut ſupellectilis è gymnaſio, aut ex balineo, aut è portubus, quod excedat 10 drachmarum æſtimationem, furtum faxit, morte luito.*

Manifeſti ſacularii (*n*) *morte luunto.*

Vecticularii (*o*) *manifeſti morte luunto.*

Plagiarii (*p*) *manifeſti morte luunto.*

In hortos irrumpere ficoſque deligere capital eſto (*q*): So that the quantity of the thing ſtolen, the place, the ſeaſon, the manner, and other circumſtances heightened theft into a capital puniſhment, that otherwiſe by *Solon's* laws was only pecuniary and impriſonment. (*r*)

2 Now

(*m*) See *A. Gellium, Lib.* XI. *cap.* 18. & *Plutarch. in Vitâ Solonis.*

(*n*) Σακκοφορικὸς, A cut-purſe.

(*o*) Λοχαγὸς, A houſe-breaker.

(*p*) Ἀνδραποδιστὴς, *Sive Plagiarius, is eſt, qui ſine vi, dolo malo, ſcions abducit homines liberos & ingenuos, venditque pro ſervis, aut ſupprimit: vel is eſt, qui alienos ſervos abducit ſine vi, & plerumque ſine furto, & fugam perſuadet, aut fugitivos celat.* Petit. Comment. ad Lib. VII. tit. 5. de furtis.

(*q*) But this was a temporary law, made in a time of dearth, when it was thought neceſſary to prohibit the exportation of Figs. However, proſecutions of offenders againſt this law ſoon grew odious; from hence all malicious informers were called *Sycophants.* Vide *Athenæi Deipnoſophiſt. Lib.* III. & *Scholiaſt. in Ariſtophanis Plutum ad* v. 31, & 874.

(*r*) Among the *Lacedæmonians* all manner of theft was permitted, as a practice, which tended to inſtruct their youth in the ſtratagems of war. *A. Gel. Lib.* XI. *cap.* 18. It was alſo encouraged among the antient *Egyptians. A. Gel. ubi ſupra.* But we learn from *Diodor. Sic. Lib.* I. that it was allow'd only on certain conditions, for it was provided by a law, that whoever was minded to follow the trade of thieving, ſhould firſt enter his name with the captain of the gang, and ſhould bring in all his booty to him, that ſo the right owner might know where to apply for the recovery of his goods, which were reſtored to him on paying the quarter of the value.

Now as to the *Roman* laws: For a theft, that was not *furtum manifeſtum*, there is given *actio in duplum*; but if it were *furtum manifeſtum*, *actio in quadruplum* (*f*); *furtum autem manifeſtum eſt, cum fur deprehenditur in furto.* (*g*)

But now as to puniſhments among the *Romans*, there were theſe degrees or orders: I. Capital puniſhments, (*viz. ultimum ſupplicium*) (*h*) which were 1. *Damnatio ad furtum.* 2. *Vivi crematio.* 3. *Capitis amputatio.* 4. *Damnatio ad feras.* II. Others, that were in the next degree, were 1. *Coercitio ad metalla.* 2. *Deportatio ad inſulas.* III. Others again of a lower allay were 1. *Relegatio ad tempus vel in perpetuum.* 2. *Datio in publicum opus.* 3. *Fuſtigatio.* (*i*)

I find not among the *Romans* any greater puniſhment of theft, than four-fold reſtitution (*k*); unleſs in theſe caſes:

1. *Si quis ex metallo principis vel ex monetâ ſacrâ furatus eſt, pœnâ metalli & exilii punitur.* (*l*)

2. *Graſſatores qui cum ferro aggredi & ſpoliare inſtituunt, capite puniuntur.* (*m*)

3. *Famoſi latrones ad beſtias vel furcas damnantur.* *Digeſt. de pœnis.* (*n*)

If we come to the laws and cuſtoms of our own kingdom, we ſhall find the puniſhment of theft in ſeveral ages to vary according as the offenſe grew and prevailed more or leſs. (*o*)

Among

(*f*) *Inſt. Lib.* IV. *tit.* 6. §. 1. *Digeſt. Lib.* XLVII. *tit.* 2. *de furtis*, *l.* 68. §. 2. herein the *Roman* law greatly reſembled the *Jewiſh*, with this difference, that by the *Jewiſh* law the puniſhment of four-fold was to be inflicted of reſtitution; whereas by the *Roman* law the thing ſtolen was recoverable over and above the *pœna quadrupli*. *Dig. eod. tit. l.* 32. §. 1.

(*g*) *Dig. eod. tit. l.* 2. *l.* 3. *pr.* By this was meant not only if he was taken in the Fact, but alſo if he was apprehended with the goods upon him before he had carried them to the place where they were to remain that night, and anſwers to the expreſſion in our law of being taken in the *manour*.

(*h*) *Dig. Lib.* XLVIII. *tit.* 19. *de pœnis*, *l.* 21.

(*i*) *Dig. eod. tit. l.* 28. *pr.* §. 1. *l.* 11. §. 3.

(*k*) *Dig. Lib.* XLVIII. *tit.* 19. *ad leg. Jul. peculatûs*, *l.* 6. §. 2. *Lib.* XLVIII. *tit.* 15. *de furtis*, *l.* 18.

(*l*) *Dig. eod. tit. l.* 28. §. 10.

(*m*) *Dig. eod. tit. l.* 28. §. 15.

(*n*) By the laws of *Zaleucus*, if one man took any thing from another, he was to reſtore three-fold beſides a fine to the king, *l.* 9. if he took any thing from the king, he was to reſtore nine-fold, *l.* 4.

By

Among the laws of king *Athelstan*, mentioned by *Brampton*, *p.* 849, 852, 854. *Non parcatur alicui latroni supra* 12 *annos & supra* 12 *d. quin occidatur* (*d*), *Edmund* his successor (*), *præcepit nè infra* 15 *annos, vel pro latrocinio infra* 12 *d. occidatur, nisi fugerit, vel se defenderit*: *Malmsbury* tells us, that in the time of *William* I. theft was punished with castration, and loss of eyes (*e*); but in the time of *Henry* I. the antient law, which continues to this day, was *ut si quis in furto vel latrocinio de prehensus fuerit, suspenderetur.* (*f*)

And altho many of the schoolmen and canonists are of opinion that death ought not to be inflicted for theft (*g*), yet

By the laws of *Ina* a thief was punished with death, unless he redeemed his life *capitis æstimatione*, *l.* 12. which was 60 *s. l.* 7. but if a villain, who had been often accused, should be taken in a theft, he was to have an hand or foot cut off, *l.* 18.

By the laws of *Alfred* whoever stole a mare with the foal, or a cow with the calf, was to pay 40 *s.* besides the price of the mare or cow, *l.* 16. Whoever stole any thing out of a church, was to pay the value, and a fine according to the value; and also was to have that hand cut off, which committed the fact, *l.* 6. If any person committed a theft *die Dominico*, or any other great festival, he was to pay double, *l.* 5.

(*d*) By the first law of *Athelstan* it was but 8 *d.* *Wilkins leges Anglo-Sax. p.* 56. but afterwards by the laws of the same king enacted at *London*, and thence call *judicia civitatis Londoniæ*, no one was to be put to death for a theft under 12 *d. Ibid. p.* 63. But in case the thief fled or made resistance, then he might be put to death, tho it were under that value. *Ibid. p.* 70. By the law of *Canute* theft was punished with death. *Ibid. p.* 134. *l.* 4. and *p.* 143. *l.* 61.

(*) This is a mistake, for no such law is found among the laws of that king, but it is among the later laws of king *Athelstan*. *Vide Judicia Civ. Lond. Wilk. leg. Anglo-Sax. p.* 70.

(*e*) By the laws of *William* I. it was expressly prohibited, that any should be hanged or put to death for any offence, but that his eyes should be pulled out, his testicles, hands or feet cut off, according to the degree of his crime, *l.* 67. *apud Wilkins leg. Anglo-Sax. p.* 229, *p.* 218.

(*f*) In former times, tho the punishment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ransom; but in the 9th Year of *Henry* I. it was enacted, that whoever was convicted of theft (or any other felony. 3 *Co. Inst.* 52.) should be hanged, and the liberty of redemption was entirely taken away. *Wilk. leg. Anglo-Sax. p.* 304. This law still remains at this day; but considering the alteration in the value of money, the severity of it is much greater now than then, for 12 *d.* would then purchase as much as 40 *s.* will now; and yet a theft above the value of 12 *d.* is still liable to the same punishment, upon which Sir *Hen. Spelman* justly observes, that while all things else have rose in their value and grown dearer, the life of man is become much cheaper. *Spelm. in verbo latrocinium*; from hence that learned author takes occasion to wish, that the antient tenderness of life were again restored, *Justum certè est, ut collapsa legis æquitas restauretur, & ut divinæ imaginis vehiculum, quod superiores priderm ætates ob gravissima crimina nequaquam tollerent, levioribus hodie ex delictis non perderetur.*

(*g*) *Scotus Sentent. 4. distinct.* 134. *quæst.* 3. *Sylvester in verbo furtum* 3. Not only the schoolmen and canonists were of this opinion, but by what has been above said it appears likewise to have been the sense both of the *Jewish* and *Roman* laws; and tho, as our author says, the prin-

yet the neceſſity of the peace and well ordering of the kingdom hath in all ages and almoſt all countries prevailed againſt that opinion, and annexed death as the puniſhment of theft, when the offenſe hath grown very common and accompanied with enormous circumſtances, tho in ſome places more is left herein to the *Arbitrium Judicis* to give the ſame or a more gentle ſentence according to the quality of the offenſe and offender, than is uſed in *England*, where the laws are more determinate, and leave as little as may be to the *Arbitrium Judicis*. See the caſe diſputed learnedly by *Covarruvias Tomo* 2. *Lib.* II. *cap.* 9. §. 7.

This I have therefore mentioned, that it may appear, that capital puniſhments are variouſly appointed for ſeveral offenſes in all kingdoms and ſtates, and there is a neceſſity it ſhould be ſo, for regularly the true, or at leaſt, the principal end of puniſhments is to deter men from the breach of laws, ſo that they may not offend, and ſo not ſuffer at all, and the inflicting of puniſhments in moſt caſes is more for example and to prevent evils, than to puniſh. When offenſes grow enormous, frequent and dangerous to a kingdom or ſtate, deſtructive or highly pernicious to civil ſocieties, and to the great inſecurity and danger of the kingdom and its inhabitants, ſevere puniſhments, even death it ſelf, is neceſſary to be annexed to laws in many caſes by the prudence of law-givers, tho poſſibly beyond the ſingle demerit of the offenſe it ſelf ſimply conſider'd.

Penalties therefore regularly ſeem to be *juris poſitivi, & non naturalis*, as to their degrees and applications, and therefore in different ages and ſtates have been ſet higher or lower according to the exigence of the ſtate and wiſdom of the law-giver. Only in the caſe of *murder* there ſeems to be a juſtice of retaliation, if not *ex lege naturali*, yet at leaſt by a general divine law given to all mankind, *Gen.* ix. 6. and altho I do not deny but the ſupreme king of the world may

E remit

principal end of puniſhment is to deter men from offending, yet it will not follow from thence, that it is lawful to deter them at any rate, and by any means; for even obedience to juſt laws may be inforced by unlawful methods. *Cic. Epiſt.* 25. *ad Brutum. Eſt pœnæ modus, ſicut rerum reliquarum*; and again *Lib.* I. *de officiis, Eſt enim ulciſcendi & puniendi modus.* Beſides experience might teach us, that capital puniſhments do not always beſt anſwer that end. See *Grot. de jur. bel. &c. Lib.* II. *cap.* 20. §. 12. *n.* 3.

remit the ſeverity of the puniſhment, as he did to *Cain*, yea and his ſubſtitutes ſovereign princes may alſo defer or remit that puniſhment, or make a commutation of it upon great and weighty circumſtances, yet ſuch inſtances ought to be very rare, and upon great occaſions.

In other caſes the *lex talionis* in point of puniſhments ſeems to be purely *juris poſitivi*; and altho among the *Jewiſh* laws we find it inſtituted *Exod.* xxi. 24, 25. *Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, ſtripe for ſtripe*; yet in as much as the party injur'd is living and capable of another ſatisfaction of his damage, (which he is not in caſe of murder) I have heard men greatly read in the *Jewiſh* lawyers and laws affirm, that theſe *taliones* among the *Jews* were converted into pecuniary rates and eſtimates to the party injured, ſo that in penal proceedings the rate or eſtimate of the loſs of an eye, tooth, hand or foot was allowed to the perſon injur'd, *viz.* the price of an eye for an eye, and the price of an hand for an hand, *&c.* (*b*)

(*b*) *Maimonides More Nevochim, Pars* III. *cap.* 41.

CHAP. II.

Concerning the ſeveral incapacities of perſons, and their exemptions from penalties by reaſon thereof.

MAN is naturally endowed with theſe two great faculties, underſtanding and liberty of will, and therefore is a ſubject properly capable of a law properly ſo called, and conſequently obnoxious to guilt and puniſhment for the violation of that law, which in reſpect of theſe two great faculties he hath a capacity to obey: The conſent of the will

is that, which renders human actions either commendable or culpable; as where there is no law, there is no tranſgreſſion; ſo regularly, where there is no will to commit an offenſe, there can be no tranſgreſſion, or juſt reaſon to incur the penalty or ſanction of that law inſtituted for the puniſhment of crimes or offenſes. And becauſe the liberty or choice of the will preſuppoſeth an act of the underſtanding to know the thing or action choſen by the will, it follows that, where there is a total defect of the underſtanding, there is no free act of the will in the choice of things or actions. But general notions or rules are too extravagant and undeterminate, and cannot be ſafely in their latitude applied to all civil actions; and therefore it hath been always the wiſdom of ſtates and law-givers to preſcribe limits and bounds to theſe general notions, and to define what perſons and actions are exempt from the ſeverity of the general puniſhments of penal laws in reſpect of their incapacity or defect of will.

Thoſe incapacities, or defects, that the laws, eſpecially the laws of *England*, take notice of to this purpoſe, are of three kinds:

I. Natural.
II. Accidental.
III. Civil incapacities or defects.

The natural is that of *Infancy*.
The accidental defects are,
1. *Dementia*.
2. *Caſualty*, or *Chance*.
3. *Ignorance*.
The civil defects are,
1. *Civil Subjection*.
2. *Compulſion*.
3. *Neceſſity*.
4. *Fear*.

Ordinarily none of theſe do excuſe thoſe perſons, that are under them, from civil actions to have a pecuniary recompenſe

penſe for injuries done, as *treſpaſſes*, *batteries*, *woundings*; becauſe ſuch a recompenſe is not by way of penalty, but a ſatisfaction for damage done to the party: but in caſes of crimes and miſdemeanors, where the proceedings againſt them is *ad pœnam*, the law in ſome caſes, and under certain temperaments takes notice of theſe defects, and in reſpect of them relaxeth or abateth the ſeverity of their puniſhments.

CHAP. III.

Touching the defect of infancy and nonage.

THE laws of *England* have no dependence upon the civil law, nor are governed by it, but are binding by their own authority; yet it muſt be confeſſed, the civil laws are very wiſe and well compoſed laws, and ſuch as have been found out and ſettled by wiſe princes and law-givers, and obtain much in many other kingdoms ſo far as they are not altered abrogated or corrected by the ſpecial laws or cuſtoms of thoſe kingdoms, and therefore may be of great uſe to be known, tho they are not to be made the rules of our *Engliſh* laws; and therefore tho I ſhall in ſome places of this book, and here particularly, mention them, yet neither I, nor any elſe may lay any weight or ſtreſs upon them, either for diſcovery or expoſition of the laws of *England*, farther than by the cuſtoms of *England* or Acts of Parliament they are here admitted.

As to this buſineſs touching infancy, and how far they are capable of the guilt or puniſhment for crimes: I will conſider, 1. What the civil laws tell us concerning the ſame. 2. What the common laws of *England* have ordained touching it, and wherein theſe agree, and wherein they differ touching this matter.

The Civil law distinguisheth the ages into several periods as to several purposes.

First, The complete full age as to matters of contract is according to their law twenty-five years (*a*), but according to the law of *England* twenty-one years. (*b*)

Secondly, But yet before that age, viz. at seventeen years, a man is said to be of full age to be a procurator (*c*), or an executor (*d*); and with that also our law agrees. 5 *Co. Rep. Pigot's* case. (*e*)

Thirdly, As to matrimonial contracts the full age of consent in males is fourteen years, and of females twelve (*f*); till that age they are said to be *impuberes* (*g*), and are not bound by matrimonial contracts; and with this also our law agrees. (*h*)

Fourthly, As to matter of crimes and criminal punishments, especially that of death, they distinguish the ages into these four ranks.

1. *Ætas pubertatis plena.*
2. *Ætas pubertatis.*
3. *Ætas pubertati proxima.*
4. *Infantia.*

1. *Pubertas plena* is eighteen years. (*i*)

2. *Puber-*

(*a*) *Institut. Lib.* I. *tit.* 23. *De Curatoribus. Dig. Lib.* IV. *tit.* 4. *de Minoribus, l.* 1. *&c.*

(*b*) *Lit.* §. 104. *Co. Lit.* §. 103.

(*c*) *Institut. Lib.* I. *tit.* 6. *Quibus ex causis manumittere non licet,* §. 5 *&* 7. *Dig. Lib.* III. *tit.* 1. *De Postulando, l.* 1. §. 3. At this age it was the custom among the *Romans* to lay aside the habits of children, and put on the garments of men. *Val. Max. Lib.* V. *cap.* 4. §. 4. *Sueton. August. cap.* 8.

(*d*) See *Swinb.* of wills, *par.* V. §. 1. *n.* 6.

(*e*) It is quoted in *Prince's* case; 5 *Co. Rep.* 29. *b.* Office of Executors, *p.* 307.

(*f*) *Instit. Lib.* I. *tit.* 10. *de nuptiis pr. Dig. Lib.* XXIII. *tit.* 2. *de ritu nuptiarum, l.* 4.

(*g*) *Institut. Lib.* I. *tit.* 22. *Quibus modis tutela finitur. pr. Dig. Lib.* XXVIII. *tit.* 6. *de vulg. & pupil. substitut. l.* 2. *Macrob. Saturn. Lib.* VII. *cap.* 7.

(*h*) *Co. Lit.* §. 104. At the same age they were permitted by the civil law to make a testament. *Digest. Lib.* XXVIII. *tit.* 1. *Qui testamenta facere possunt, l.* 3. *Institut. Lib.* II. *tit.* 12. *Quibus non est permissum facere testamentum,* §. 1. *Cod. Lib.* VI. *tit.* 22. *Qui testamenta facere possint, vel non, l.* 4. The common law seems not to have determined precisely at what age one may make a testament of a personal estate; it is generally allowed that it may be made at the age of eighteen. *Office of Executors, p.* 303. *Co. Lit.* 89. *b.* and some say under, for the common law will not prohibit the spiritual court in such cases. Sir *Tho. Jones, Rep.* 210. 1 *Vern.* 255. 2 *Vern.* 465.

(*i*) *Dig. Lib.* I. *tit.* 7. *de adoption. l.* 40. §. 1. *Instit. eod. tit.* §. 4. *Dig. Lib.* XLII.

2. *Pubertas* generally, in relation to crimes and punishments is the age of fourteen years and not before (k); and it seems, as to this purpose there is no difference between the male and female sex; at this age they are supposed to be *doli capaces*, and therefore for crimes, altho capital, committed after this age they shall suffer as persons of full age (l), only by the constitutions of some kingdoms, in favour of their age, the ordinary punishments were not inflicted upon such young offenders; as in *Spain*, not unless he were of the age of seventeen years. *Vide Covar. de Matrimonio, cap.* 5. §. 8. (m) *In Relectione ad Clement. cap. Si furiosus* (n). By the antient law among the *Jews*, he that was but a day above thirteen years, was as to criminals adjudged *in virili flavu*, but not if under that age. (†)

3. *Ætas pubertati proxima*, herein there is great difference among the *Roman* lawyers; and tho they make a disparity herein between males and females, yet I think as to point of crimes the measure is the same for both: Some assign this *Ætas pubertati proxima* to ten years and an half; others to eleven years (o): If they be under the age, which they call *Ætas pubertati proxima*, they are presumed *incapaces doli* (p), and therefore regularly not liable to a capital punishment for a capital offense; but this holds not always true, for according to the opinion of very learned civilians before ten years and a half they may be *doli capaces*, and therefore it must be left *ad arbitrium judicis* upon the circumstances of the case, yet with this caution, *Judex, qui ante illam ætatem arbitrari debet puerum esse proximum pubertati, maximis adducendus est conjecturis, & cautissime id agat, ac tandem raro. Covar. ubi supra* (q). And with this agrees our law, as shall be shewed.

XLII. *tit.* 1. *de re judicat. l.* 57. *Lib.* XXXIV. *tit.* 2. *De alimentis, l.* 14. §. 1.

(k) *Dig. Lib.* XXIX. *tit.* 5. *de Senatusconsulto Silaniano, &c. l.* 1. §. 22.

(l) *Dig. Lib.* IV. *tit.* 4. *de minoribus, l.* 37. §. 1. *Lib.* XLVIII. *tit.* 3. *ad leg. Jul. de adult. l.* 36. *Cod. Lib.* 2. *tit.* 33. *Si adversus delictum, l.* 1.

(m) *Tom.* 1. *p.* 157.

(n) *Par.* III. §. 5. *Tom.* 1. *p.* 558.

(†) *Seld. de Synedriis, Lib.* II. *cap.* 13. §. 232.

(o) The prevailing opinion is that the males are *pubertati proximi* at ten and an half, and the females at nine and an half, because when they had pass'd the middle distance between infancy and puberty, they might then be properly said to be *ætatis pubertati proximæ*.

(p) *Dig. Lib.* XLVII. *tit.* 12. *de Sepulchro violato. l.* 3. §. 1.

(q) *Tom.* 1. *p.* 157.

shewed. But if the offender be *in ætate pubertati proximâ*, *viz.* according to some, ten years and an half, according to others eleven years old, he is more easily presumed to be *doli capax*, and therefore may suffer as another man, unless by great circumstances it appear, that he is *incapax doli*. But this hath also its temperaments, 1. By express provision of the constitution *in Codice De falsâ Monetâ*: "*Impuberes, si cusores fuerint, nullam sustinebunt detrimentum, quia ætas eorum, quid videat, ignorat*"; but a penalty is laid upon the tutor. (r)

2. Tho *ætas pubertati proxima* is regularly presumed *capax doli*, and so may be guilty of a capital offense. *Digest. De regulis juris* (*s*). *Pupillum, qui proximus est pubertati, capacem esse furandi*, yet as it is *in arbitrio judicis* to judge an infant within ten years and an half *capax doli*, as before; so it is in *arbitrio judicis* upon consideration of circumstances to judge one above ten years and a half, nay of twelve, thirteen years, or but a day within fourteen years, to be *incapax doli*, and so privileged from punishment, as appearing upon the circumstances of the fact not yet *confirmatus in ætate proximâ pubertati*, or at least not *doli capax*; and with this our law doth in a great measure agree.

3. That if he be above ten years and a half, and appears *doli capax*, yet if under fourteen years, he is not to be punished *pœnâ ordinariâ*, but it may have some relaxation *ex arbitrio judicis*. (*t*) But altho our law indulges a power to the judge to reprieve before or after judgment an infant convict of a capital offense in order to the king's pardon, yet it allows no arbitrary power to the judge to change the punishment that the law inflicts; and thus far for the third age or period, *Ætas pubertati proxima*.

4. The fourth age or period is *infantia*, which lasts till seven years; within this age there can be no guilt of a capital offense; the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty (*u*);

(*r*) *Lib.* IX. *tit.* 9. *l.* 2.

(*s*) *Lib.* L. *tit.* 17. *l.* 111. *Lib.* XXIX. *tit.* 5. *de Senatusconsulto Silaniano*, *l.* 14. *Lib.* XLIV. *tit.* 4. *de dol. mali. exceptione*, *l.* 4. *§.* 26. *Instit. Lib.* IV. *tit.* 1. *de obligat. quæ ex delicto*, *§.* 18. *Dig. Lib.* XLVII. *tit.* 2. *de furtis*, *l.* 14.

(*t*) *Dig. Lib.* IV. *tit.* 4. *de minoribus*, *l.* 37. *§. In delictis.*

ty (*u*); and if indicted for ſuch an offenſe as is in its nature capital, he muſt be acquitted; and therefore the ſeverity of the gloſs upon the decretal *De delictis puerorum, cap.* 1. (*x*) is juſtly rejected in this caſe (*y*), and with this agrees the law of *England*.

But now let us conſider the laws of *England* more particularly touching the privilege of infancy in relation to crimes and their puniſhments, and that in relation to two kinds of crimes, 1. ſuch as are not capital, 2. ſuch as are capital.

Firſt, As to miſdemeanors and offenſes that are not capital: in ſome caſes an infant is privileged by his nonage, and herein the privilege is all one, whether he be above the age of fourteen years or under, if he be under one and twenty years; but yet with theſe differences:

If an infant under the age of twenty-one years be indicted of any miſdemeanor, as a *riot* or *battery*, he ſhall not be privileged barely by reaſon that he is under twenty-one years, but if he be convicted thereof by due trial, he ſhall be fined and impriſoned; and the reaſon is, becauſe upon his trial the court *ex officio* ought to conſider and examine the circumſtances of the fact, whether he was *doli capax*, and had diſcretion to do the act wherewith he is charged; and the ſame law is of a *feme covert*. 2. But if the offenſe charged by the indictment be a mere non-feaſance, (unleſs it be of ſuch a thing as he is bound to by reaſon of tenure, or the like, as to repair a bridge, *&c.*) (*z*) there in ſome caſes he ſhall be privileged by his nonage, if under twenty-one, tho above fourteen years, becauſe *Laches* in ſuch a caſe ſhall not be imputed to him (*a*).

36 E. 3. *Aſſiſ.* 443. 4 H. 7. 11. *b.* If an infant in *Aſſiſe* vouch a record, and fail at the day, he ſhall not be impriſoned (*b*), nor it ſeems a *feme covert*. 13 *Aſſiſ.* 1. (*c*) and yet the ſtatute of *Weſtmin.* 2. *cap.* 25. that gives impriſonment, in ſuch a caſe, is general.

(*u*) *Dig. Lib.* XLVII. *tit.* 2. *de furtis, l.* 23. *Lib.* XLVIII. *tit.* 8. *ad leg. Cornel. de ſicariis, l.* 22.
(*x*) *Decretal. Lib.* V. *tit.* 23.
(*y*) *Tom.* 1. *f.* 157.
(*a*) 2 *Co. Inſt.* 305.
(*a*) *B. Saver default*, 30. *Cro. Jac.* 463, 466. *Pl. Com.* 364. *a. Co. Lit.* 246. *b.*
(*b*) 2 *Co. Inſtit.* 414.
(*c*) *B. Coverture* 35. *Reſcrit* 87.

8 *E.* 2. *Corone* 395. If *A* kills *B.* and *C.* & *D.* are preſent, and do not attach (*d*) the offender, they ſhall be fined or impriſoned; yet if *C.* were within the age of twenty-one years, he ſhall not be fined nor impriſoned.

3. Where the corporal puniſhment is but collateral, and not the direct intention of the proceeding againſt the infant for his miſdemeanor, there in many caſes the infant under the age of twenty-one ſhall be ſpared, tho poſſibly the puniſhment be enacted by parliament. 14 *Aſſ.* 17. (*e*) If an infant of the age of eighteen years be convict of a diſſeiſin with force, yet he ſhall not be impriſoned. *Vide* 26 *Aſſ.* 5. 43 *E.* 3. *Impriſonment* 16. 40 *E.* 3. 44. *a.* (*f*), and yet a feme covert ſhall be impriſoned in ſuch caſe. 16 *Aſſ.* 7.

If an infant be convict in an action of treſpaſs *vi & armis*, the entry muſt be *nihil de fine, ſed paratus, quia infans*; for if a *capiatur* be entred againſt him, it is error, for it appears judicially to the court, that he was within age, when he appears by guardian. *P.* 8 *Jac. B. R. Holbrook* v. *Dogley, Croke* 3. (*g*); the like law is that he ſhall not be *in miſericordia pro falſo clamore.* (*b*)

B. Coverture 68. General ſtatutes that give corporal puniſhment are not to extend to infants, and therefore *Pl. Com.* 364. *a. per Walſh*, if an infant be convict in raviſhment of ward, he ſhall not be impriſoned, tho the ſtatute of *Merton*, *cap.* 6. be general in that caſe (*i*): but this muſt be underſtood where it is, as before ſaid, a puniſhment as it were collateral to the offenſe, as in the caſes before mentioned: but where a fact is made felony or treaſon, it extends as well to

(*d*) The words of the book are *ne ieſſe le main d'attach.*

(*e*) *F. Impriſonment* 8.

(*f*) "Et le cauſe eſt, pur ceo que la "ley entend', que un enfant ne poit my "conuſtr' bien & mal', ne le quel ſoit "advantage pur luy, ou nemy; ne nul "ſole ſerra adjudge en un enfant." *Mes* 12 *H.* 4. 22. *b. Hank* dit, que enfant d'age de 18 ans poit eſtre diſſeiſor ove force & eſtre empriſon per cella.

(*g*) *Cro. Jac.* 274.

(*b*) *Co. Lit.* 127. *a.* yet this was not a ſettled point, for 2 *E.* 3. 5. the court doubted of it, and in 21 *E.* 3. 32. *b.* and 41 *Aſſ.* 14. the plaintiffs, tho infants, were amerced *pro falſo clamore*; but tho they were amerced, yet it appears from the ſame caſes, that they were excuſed on account of their infancy as a pardon of courſe. See 1 *R. A.* 214.

(*i*) Another like caſe is there put. If an infant be a receiver and account before auditors, and he found in arrears, the auditors cannot commit him to priſon notwithſtanding the general words of the ſtatute of *W.* 2. *cap.* 11.

infants, if above fourteen years (*k*), as to others, as ſhall be ſaid. And this appears by ſeveral acts of parliament, and particularly by 1 *Jac.* cap. 11. *of felony for marrying two wives*, &c. where there is a ſpecial exception of marriages within the age of conſent, which in females is twelve, in males fourteen years; ſo that if the marriage were above the age of conſent, tho within the age of twenty-one years, it is not exempted from the penalty.

So by the ſtatute of 21 *H.* 8. cap. 7. *concerning felony by ſervants that imbezil their maſters goods delivered to them*, there is a ſpecial *proviſo*, that it ſhall not extend to ſervants under the age of eighteen years, who certainly had been within the penalty, if above the age of diſcretion, *viz.* fourteen years, tho under eighteen years, unleſs a ſpecial proviſion had been to exclude them (*l*).

I come therefore to conſider the privilege of infancy in caſes of capital offenſes and puniſhments according to the laws of *England*, wherein I ſhall examine, 1. How the antient law ſtood. 2. How it ſtands at this day in relation to infants.

I. As to the antient law:

1. By what has been before ſaid it appears the Civil law was very uncertain in defining what was that *ætas pubertati proxima*, and conſequently ſuch as might ſubject the offender to capital guilt or puniſhment; ſome taking it to be ten years and an half, ſome eleven years, others more, others leſs. The laws of *England* therefore, that always affect certainty, determined antiently the *ætas pubertati proxima* to be twelve years for both ſexes; under that age none could be regularly guilty of a capital offenſe, and above that age and under fourteen years, he might or might not be guilty according to the circumſtances of the fact that might induce the court and jury to judge him *doli capax, vel incapax* (*m*).

2 This

(*k*) *Co. Lit.* 247. *b.*

(*l*) The like exception there is in the 23 *Hen.* cap. 7. where apprentices under the age of *fifteen* years, who ſhall rob their maſters, are excepted out of the act.

(*m*) By the laws of *Ina*, *l.* 7. an infant of ten years of age might be guilty of being acceſſary to a theft, and was puniſhed accordingly with ſervitude. *Wilk. leg. Anglo-Sax. p.* 16.

This appears by the laws of king *Athelstan* mentioned in the first chapter, "*Non patiatur aliqui teneat super* 12 *annos & supra* 12 *d. quin occidatur.*" And altho his successor *Edmund* (n) reduced it to fifteen years, unless he fled, yet it will appear that the standard of twelve years obtained in after-ages (o).

2. It appears that an infant of twelve years was compellible to take the oath of allegeance in the leet, and under that age none were to take the oath, or to do suit to the leet. *Bract. Lib.* III. (p) *cap.* 1. (q) *Britton, cap.* 29. *in fine, Calvin's* case, 7 *Co. Rep.* 6. *b.* So that at that age, and not before, he was taken notice of by the law to be under the obligation of an oath, and consequently capable of discretion.

3. The ordinary process against capital offenders was and is by *Capias* and *Exigent*, and *Utlary* thereupon; but against an infant under twelve process of utlary in cases of indictment was not awardable, and if awarded, it was error; but if above that age, that process was awardable; and *Bract. Lib.* III. (r) *cap.* 11. *sect.* 4 & 5. gives the reason, "*Minor vero, qui infra ætatem* 12 *annorum fuerit, utlagari non debet, quia ante talem ætatem non est sub lege aliqua nec in decenna*"; and *ibidem cap.* 10. *sect.* 1. he mentions an old law of king *Edward* (s), "*Omnis, qui ætatis* 12 *annorum fuerit, fatere de*

(n) This is a mistake, for it was not *Edmund* but king *Athelstan* himself, who thinking it a pitiable case that a youth but twelve years old should be put to death, as was permitted by the former law, changed the time from twelve years to fifteen, and ordered that none who was but fifteen years of age should be put to death, unless he rebelled or fled; if he surrendered himself, he was only to be imprisoned until some of his relations or friends would become security for him *juxta pleniam capitis æstimationem, ut semper ab omni malo abstineat*, if he could not get any such security, then he was to take an oath to the same purpose in such manner as the bishop should direct him, and was to remain *in servitute pro capitis sui æstimatione*; but if after this he should be again guilty, then he was to be put to death without any regard to his age. See *Wilk. Leges Anglo-Sax. p.* 70.

(o) In the time of king *Henry* I. the old law of king *Athelstan* took place, viz. twelve years of age, and 8*d.* value. *Ibid. p.* 259.

(p) *De Corona.*

(q) This seems to be a mistake, for *cap.* 22. *sect.* 2. for the oath mentioned in *cap.* 2. was to be taken by knights and others of the age of fifteen years and upwards.

(r) *De Corona.*

(s) There is no such law extant among those of king *Edward*, but the law here quoted is a law of *Canute, Leg. Canuti, l.* 19. which is in these words, *Volumus ut quilibet homo* 12 *annos natus juret, se & fidem & omne fœdus illud neque fieri consensurum*, which oath is to the same purpose with that mentioned by

" *bet ſacramentum in viſu franciplegii, quod nec latro vult eſſe, nec* " *latroni conſentire*"; and *Stamf. Lib.* I. *cap.* 19. cites out of a book of *Bracton, De Viſu Franci plegii*, " *Quod quilibet duode-* " *cim annorum poteſt felonie judicium ſuſtinere*", which implies alſo that within that age, regularly at leaſt, he could not be a felon.

4. Again, T. 32. E. 1. *Rot.* 32. *Eboracum, coram rege.* " *Adam filius Ade de Arnhale captus noctanter in domo Johannis* " *Somere coram rege ductus cognovit, quod furtive cepit, &c.* 9*s.* " *per preceptum & miſſionem Richardi Short.*" *Richard Short* had his clergy, " *Et predictus Adam commiſſus fuit cuſtodie* " *mariſcalli cuſtodiend', quia infra ætatem; poſtea habito reſpectu* " *ad impriſonamentum, quod predictus Adam habuit, & etiam ad* " *teneram ætatem ejuſdem Ade, eo quod non eſt niſi ætatis* 12 " *annorum, qui talis ætatis judicium ferre non poteſt, ideo de* " *gratiâ regis deliberetur, &c.*" Upon this record theſe things are obſervable, *viz.* 1. The court recorded his confeſſion; but regularly that ought not to be, for if an infant under the age of twenty-one ſhall confeſs an indictment, the court in juſtice ought not to record the confeſſion, but put him to plead *not guilty*, or at leaſt ought alſo to have inquired by an inqueſt of office of the truth and circumſtances of the fact. 2. That here he was twelve years old, and yet judgment ſpared, and the reaſon given, *Qui talis ætatis judicium ferre non poteſt.* Yet 3. There is ſomewhat ſtill of *gratia regis* interpoſed, as it ſeems, in reſpect he was paſt the old ſtandard of twelve years.

II. But now let us come to the Common law as it ſtood in after-times, for in proceſs of time, eſpecially in and after the reign of king *Edward* III. the Common law received a greater perfection, not by the change of the Common law, as ſome have thought, for that could not be but by act of parliament: but men grew to greater learning, judgment and experience,

2

by *Bracton, Lib.* III. *de corona, cap.* 1. to be taken at the age of fifteen; and tho there be a difference as to the age, yet probably it is the ſame oath, for it is very eaſy and natural to miſtake xii for xv. See the ſtatute of *Marlbridge, cap.* 10 & 25. and lord *Coke*'s comment thereon, 2 *Inſt.* 147. where he takes notice that the old books are miſprinted. See alſo 2 *Inſtit.* 72. *Mirror, cap.* 1. §. 3. *Britton, cap.* 12.

perience, and rectified the miſtakes of former ages and judgments, and the law in relation to infants and their puniſhments for capital offenſes was and to this day is as followeth.

1. It is clear that an infant above fourteen and under twenty-one is equally ſubject to capital puniſhments, as well as others of full age; for it is *præſumptio juris*, that after fourteen years they are *doli capaces*, and can diſcern between good and evil; and if the law ſhould not animadvert upon ſuch offenders by reaſon of their nonage, the kingdom would come to confuſion. Experience makes us know, that every day murders, bloodſheds, burglaries, larcenies, burning of houſes, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they ſhould have impunity by the privilege of ſuch their minority, no man's life or eſtate could be ſafe (*t*). In my remembrance at *Thetford* a young lad of ſixteen years old was convict for ſucceſſive wilful burning of three dwelling-houſes, and in the laſt of them burning a child to death, and yet had carried the matter ſo ſubtilly, that by a falſe accuſation of another perſon for burning the firſt houſe an innocent perſon was brought in danger, if it had not been ſtrangely diſcovered: he had judgment to die, and was accordingly executed. (*u*)

Fourteen years of age therefore is the common ſtandard, at which age both males and females are by the law obnoxious to capital puniſhments for offenſes committed by them at any time after that age; and with this agrees *Fitz. N.B.* 202. *b.* (*x*) *Co. Littl.* §. 405. (*y*) *Vide* Mr. *Dalton's Juſtice of Peace, cap.* 95. and 104. (*z*)

(*t*) Our author's argument concludes very ſtrongly againſt their eſcaping with *impunity*, but loſes much of its force when urged in behalf of *capital* puniſhments, for there is no neceſſity that if they be not capitally puniſhed they muſt therefore go unpuniſhed; ſo that whatever ſeverity may be needful in caſes of murders and acts of violence, yet in the common inſtances of larceny and ſtealing ſome other puniſhment might be found, which might leave room for the reformation of young offenders.

(*u*) At *Abingdon* aſſizes, *Feb.* 23. 1629. before *Whitlock* juſtice, one *John Dean* an infant between eight and nine years was indicted, arraigned, and found guilty of burning two barns in the town of *Windſor*; and it appearing upon examination that he had malice, revenge, craft and cunning, he had judgment to be hanged, and was hanged accordingly. *MS. Report.*

(*x*) *N. Edit. p.* 450.

(*y*) *p.* 247. *b.*

(*z*) The firſt edition, but in the laſt edition, *cap.* 147 and 157.

2. An infant under the age of fourteen years and above the age of twelve years is not *primâ facie* presumed to be *doli capax*, and therefore regularly for a capital offense committed under fourteen years he is not to be convicted or have judgment as a felon, but may be found not guilty.

But tho *primâ facie* and in common presumption this be true, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil at the time of the offense committed, he may be convicted and undergo judgment and execution of death, tho he hath not attained *annum pubertatis, viz.* fourteen years; tho according to the nature of the offense and circumstances of the case the judge may or may not in discretion reprieve him before or after judgment, in order to the obtaining the king's pardon. 12 *Ass.* 30. *Corone* 118 & 170. *Alice de Walborough* of the age of thirteen years was burnt by judgment for killing her mistress, and it was there said, that by the antient law none shall be hanged within age which is intended the age of discretion, *viz.* fourteen years; but before *Spigurnel* an infant within age (*a*), that had kild his companion, and hid himself (*se muchia*) was presently hanged; for it appeared by his *muching* he could discern between good and evil, and *malitia supplet ætatem.*

25 E. 3. 85. *Corone* 129. One within age was found guilty of larceny, and by reason of his nonage judgment was respited, but afterwards he was brought to the bar and had his judgment; tho this book be generally *one whipp age*, it must be intended within the age of discretion, *viz.* fourteen years, for it was never made a doubt, whether if above that age he might not have judgment.

3. But yet farther, if an infant be above seven years old and under twelve years, (which according to the antient law was *Ætas pubertati proxima*) and commit a felony, in this case *primâ facie* he is to be judged not guilty, and to be found so, because he is supposed not of discretion to judge between good and evil (*b*); yet even in that case, if it appear by strong

4 and

(*a*) Ten years old according to *Fitzherbert's Report Corone* 118.

(*b*) *Corone* 133.

and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him. 3 *H.* 7. 1. *b.* & 12. *b.* An infant of the age of nine years killed an infant of the like age, he confessed the felony, and upon examination it was found he hid the blood and the body; the justices held he ought to be hanged. (*c*)

But in cases of this nature, 1. It is necessary that very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did; for if the law require such an evidence where the offender is above twelve and under fourteen, much more if he were under twelve at the time of the fact committed. 2. The circumstances must be inquired of by the jury, and the infant is not to be convict upon his confession. 3. It is prudence in such a case even after conviction to respite judgment, or at least execution (*d*); but yet I do not see how the judge can discharge him if he be convict, but only reprieve him from judgment, and leave him in custody till the king's pleasure be known.

And therefore the book of 35 *H.* 6. 11. & 12. *per Moyle & Billing*, "*That tho a jury should find such an infant guilty, the court* ex officio *must discharge him*", must be understood either *first* only of a reprieve before judgment, or *secondly* at least, that the jury find the fact, and that he was either within the age of infancy, *viz.* seven years old, or that he did the fact, but was under fourteen, and not of discretion to judge between good and evil; in which case the court *ex officio* ought to discharge him, because it is not felony.

4. And lastly, If an infant within age be *infra ætatem infantiæ*, *viz.* seven years old, he cannot be guilty of felony (*e*), what-

(*c*) But however they respited the execution that he might get a pardon. *F. Coron* 55. *B. Coron* 133. *Dalton* says that an infant of eight years of age may commit homicide, and shall be hanged for it. See *Dalton's Justice*, *cap.* 147.

(*d*) *Dalt. Justice*, *p.* 303.

(*e*) And yet there is a precedent in the register, *fol.* 309. *b.* of a pardon granted to an infant within the age of seven years, who was indicted for homicide: in this case the Jury found, that he did the fact before he was seven years old.

whatever circumstances proving discretion may appear; for *ex præsumptione juris* he cannot have discretion (*f*), and no averment shall be received against that presumption: and altho the laws of *England*, as well as the Civil and Canon law, assign a difference between males and females as to their age of consent to marriage, *viz.* fourteen to the male, twelve to the female; yet it seems to me, that as to matters of crimes, especially in relation to capital punishments, the females have the same privilege of nonage as the males; and therefore the regular *Annus pubertatis* in reference to capital crimes and punishments of both is fourteen years, with those various temperaments and exceptions above assigned.

And it is to be observ'd, that in all cases of infancy, insanity, *&c.* if a person uncapable to commit a felony be indicted by the grand inquest, and thereupon arraigned, the petit jury may either find him generally not *guilty*, or they may find the matter specially, that he committed the fact, but that he was *non compos*, or that he was under the age of fourteen, *scilicet ætatis* 13 *annorum*, and had not discretion to discern between good and evil, *& non per feloniam*; and thereupon the court gives judgment of acquittal. 21 *H.* 7. 31. (*g*) But if a man be arraigned in such a case upon an indictment of murder or manslaughter by the coroner's inquest, there if the party committed the fact, regularly the matter ought to be specially found, because if the jury find the party not guilty, they must inquire how he came by his death, *viz.* "*Et jura-*
"*tores prædicti quæsiti per curiam, quomodo is ad mortem suam*
"*devenit, dicunt super sacramentum suum, quod prædictus A. B.*
"*die——anno—— apud D. dum non fuit compos mentis*, or
"*dum fuit infra ætatem discretionis, scilicet 9 annorum, nec sci-*
"*vit discernere inter bonum & malum, prædictum J. S. cum gla-*
"*dio, &c. percussit & ipsum ad tunc & ibidem occidit, sed non*
"*ex malitiâ præcogitatâ, neque per feloniam, vel felleo animo;*
"*& sic idem J. S. ad mortem suam devenit.*" But if he be first arraigned, and acquitted upon the indictment by the grand inquest,

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(*f*) *Plowd.* 19. *a.* (*g*) *B. Corone* 61.

inqueſt, and found not guilty, he may plead that acquittal upon his arraignment upon the coroner's inqueſt, and that will diſcharge him; and the petit jury ſhall inquire farther how the party came by his death.

CHAP. IV.

Concerning the defect of ideocy, madneſs *and* lunacy, *in reference to criminal offenſes and puniſhments.*

AND thus far touching that natural defect of *infancy*. Now concerning another ſort of defect or incapacity, namely *ideocy*, *madneſs* and *lunacy*: For tho by the law of *England* no man ſhall avoid his own act by reaſon of theſe defects (*a*), tho his heir or executor may, yet as to capital offenſes theſe have in ſome caſes the advantage of this defect or incapacity (*b*); and this defect comes under the general name of *Dementia*, which is thus diſtinguiſhed.

I. *Ideocy*, or *fatuity à nativitate vel dementia naturalis*; ſuch a one is deſcribed by *Fitzherbert*, who knows not to tell 20*s.* nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the inſtruction of another, then he is no ideot. *F. N. B.* 233. *b.* Theſe, tho they may be evidences, yet they are too narrow and conclude not always; for *ideocy or not* is a queſtion of fact triable by jury, and ſometimes by inſpection.

I II. De-

(*a*) For it is ſaid to be a maxim in law, that no man of full age ſhall be permitted to ſtultify himſelf. 4 *Co. Rep.* 123. *b. Beverly*'s caſe, *Co. Lit.* 247. *a.* the reaſon hereof is, becauſe a man cannot know or remember what acts he did when he was of *non ſane memory*. 35 *Aſſiſ. pl.* 10. See *contra F. N. B. p.* 449. *Show. Ca. Parl.* 153. 2 *Salk.* 576.

(*b*) *Co. Lit.* 247. *b. Plowd.* 19. *a.*

II. *Dementia accidentalis, vel adventitia*, which proceeds from ſeveral cauſes; ſometimes from the diſtemper of the humours of the body, as deep melancholy or adult choler; ſometimes from the violence of a diſeaſe, as a fever or palſy; ſometimes from a concuſſion or hurt of the brain, or its membranes or organs; and as it comes from ſeveral cauſes, ſo it is of ſeveral kinds or degrees; which as to the purpoſe in hand may be thus diſtributed: 1. There is a partial inſanity of mind; and 2. a total inſanity.

The former is either in reſpect to things *quoad hoc vel illud inſanire*; ſome perſons, that have a competent uſe of reaſon in reſpect of ſome ſubjects, are yet under a particular *dementia* in reſpect of ſome particular diſcourſes, ſubjects or applications; or elſe it is partial in reſpect of degrees; and this is the condition of very many, eſpecially melancholy perſons, who for the moſt part diſcover their defect in exceſſive fears and griefs, and yet are not wholly deſtitute of the uſe of reaſon; and this partial inſanity ſeems not to excuſe them in the committing of any offenſe for its matter capital; for doubtleſs moſt perſons, that are felons of themſelves, and others are under a degree of partial inſanity, when they commit theſe offenſes: it is very difficult to define the indiviſible line that divides perfect and partial inſanity, but it muſt reſt upon circumſtances duly to be weighed and conſidered both by the judge and jury, leſt on the one ſide there be a kind of inhumanity towards the defects of human nature, or on the other ſide too great an indulgence given to great crimes: the beſt meaſure that I can think of is this; ſuch a perſon as labouring under melancholy diſtempers hath yet ordinarily as great underſtanding, as ordinarily a child of fourteen years hath, is ſuch a perſon as may be guilty of treaſon or felony.

Again, a total alienation of the mind or perfect madneſs; this excuſeth from the guilt of felony and treaſon (*d*); *de quibus infra.* This is that, which in my lord *Coke*'s *Pleas of the Crown, p.* 6. is call'd by him abſolute madneſs, and total deprivation of memory.

Again,

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(*d*) 21 *H.* 7. 31. *b.*

Again, this accidental *dementia*, whether total or partial, is diſtinguiſhed into that which is permanent or fixed, and that which is interpolated, and by certain periods and viciſſitudes: the former is *phrenſie* or madneſs, the latter is that, which is uſually call'd *lunacy*, for the moon hath a great influence in all diſeaſes of the brain, eſpecially in this kind of *dementia*; ſuch perſons commonly in the full and change of the moon, eſpecially about the Equinoctes and ſummer ſolſtice, are uſually in the heighth of their diſtemper; and therefore crimes committed by them in ſuch their diſtempers are under the ſame judgment as thoſe whereof we have before ſpoken, namely according to the meaſure or degree of their diſtemper; the perſon that is abſolutely mad for a day, killing a man in that diſtemper, is equally not guilty, as if he were mad without intermiſſion. But ſuch perſons as have their lucid intervals, (which ordinarily happens between the full and change of the moon) in ſuch intervals have uſually at leaſt a competent uſe of reaſon, and crimes committed by them in theſe intervals are of the ſame nature, and ſubject to the ſame puniſhment, as if they had no ſuch deficiency (*e*); nay, the alienations and contracts made by them in ſuch intervals are obliging to their heirs and executors. (*f*)

Again, this accidental *dementia*, whether temporary or permanent, is either the more dangerous and pernicious, commonly call'd *furor, rabies, mania*, which commonly ariſeth from aduſt choler, or the violent inflamation of the blood and ſpirits, which doth not only take away the uſe of reaſon, but alſo ſuperadds to the unhappy ſtate of the patient rage, fury, and tempeſtuous violence; or elſe it is ſuch as only takes away the uſe and exerciſe of reaſon, leaving the perſon otherwiſe rarely noxious, ſuch as is a deep *delirium*, *ſtupor*, memory quite loſt, the phantaſy quite broken, or extremely diſorderd. And as to criminals theſe *dementes* are both in the ſame rank; if they are totally depriv'd of the uſe of reaſon, they cannot be guilty ordinarily of capital offenſes, for they have not the uſe of underſtanding, and act not as reaſonable creatures,

(*e*) *P. Coronæ* 32. (*f*) 4 *Co.* 123. *a.*

creatures, but their actions are in effect in the condition of brutes. (*g*)

III. The third sort of *dementia* is that, which is *dementia affectata*, namely *drunkenness*: This vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy; and therefore, according to some Civilians (*b*), such a person committing *homicide* shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasiond thereby; so that yet the formal cause of his punishment is rather the drunkenness, than the crime committed in it: but by the laws of *England* such a person (*i*) shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses. *Plowd.* 19. *a. Crompt. Just.* 29. *a.*

But yet there seems to be two allays to be allowd in this case.

1. That if a Person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him.

2. That altho the *simplex* phrenzy occasiond *immediately* by drunkenness excuse not in criminals, yet if by one or more such practices, an *habitual* or fixed phrenzy be causd, tho this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby causd puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.

Now touching the trial of this incapacity, and who shall be adjudged in such a degree thereof to excuse from the guilt of capital offenses, this is a matter of great difficulty, partly from the easiness of counterfeiting this disability, when it is to excuse a nocent, and partly from the variety of the degrees of this

(*g*) *Bract.* 420. *b. F. Corone* 193, 351.

(*b*) *Bartholinus* and others. See *Covarruvias, Tom.* 1. *p.* 557. *in relect. ad Clem. Si furiosus. Par.* III. §. 3 & 4.

(*i*) 4 *Co.* 125. *a.*

this infirmity, whereof ſome are ſufficient, and ſome are inſufficient to excuſe perſons in capital offenſes.

Yet the law of *England* hath afforded the beſt method of trial, that is poſſible, of this and all other matters of fact, namely by a jury of twelve men all concurring in the ſame judgment, by the teſtimony of witneſſes *viva voce* in the preſence of the judge and jury, and by the inſpection and direction of the judge.

There are two ſorts of trials of ideocy, madneſs or lunacy; the firſt, in order to the commitment or cuſtody of the perſon and his eſtate, which belongs to the king, either to his own uſe and benefit, as in caſe of *ideocy*; or to the uſe of the party, in caſe of accidental madneſs or *lunacy*; and in order hereunto there iſſues a writ (*k*) of commiſſion to the ſheriff or eſcheator, or particular commiſſioners both by their own inſpection and by inquiſition to inquire, and return their inquiſition into the Chancery; and thereupon a grant or commitment of the party and his eſtate enſues; and in caſe the party or his friends find themſelves injured by the finding him a lunatick or ideot, a ſpecial writ may iſſue to bring the party before the chancellor, or before the king to be inſpected. *Vide Fitz. N. B.* 233. (*l*)

But this concerns not the purpoſe in hand; for whether the party that is ſuppoſed to commit a capital offenſe be thus found an ideot, madman, or lunatick, or not, yet if really he be ſuch, he ſhall have the privilege of his ideocy, lunacy, or madneſs, to excuſe him in capitals.

Secondly therefore, the trial of the incapacity of a party indicted or appealed of a capital offenſe is, upon his plea of *not guilty*, by the jury upon his arraignment, who are to inquire thereupon touching ſuch incapacity of the priſoner, and whether it be to ſuch a degree, as may excuſe him from the guilt of a capital offenſe. (*m*)

In preſumption of law every perſon of the age of diſcretion is preſumed of *ſane memory*, unleſs the contrary be proved; and this holds as well in caſes civil, as criminal.

(*k*) See *Stamf. Prerog.* 35. *b.* (*l*) *N. Edit.* 517. (*m*) *Savil.* 50. 1 *And.* 107.

Again, if a man be a lunatick, and hath his *lucida intervalla*, and this be ſufficiently proved, yet the law preſumes the acts or offenſes of ſuch a perſon to be committed in thoſe intervals, wherein he hath the uſe of reaſon, unleſs by circumſtances or evidences it appears they were committed in the time of his diſtemper; and this alſo holds in civils, as well as in criminals.

And altho in civil caſes he, that goes about to allege an act done in the time of lunacy, muſt ſtrictly prove it ſo done, yet in criminal caſes (where the court is to be thus far of counſel with the priſoner, as to aſſiſt him in matters of law and the true ſtating of the fact) if a lunatick be indicted of a capital crime, and this appears to the court, the witneſſes to prove the fact may and muſt alſo be examined, whether the priſoner were under actual lunacy at the time of the offenſe committed.

A man, that is *ſurdus & mutus a nativitate*, is in preſumption of law an ideot, and the rather, becauſe he hath no poſſibility to underſtand, what is forbidden by law to be done, or under what penalties (*n*): but if it can appear, that he hath the uſe of underſtanding, which many of that condition diſcover by ſigns to a very great meaſure, then he may be tried, and ſuffer judgment and execution, tho great caution is to be uſed therein. (*o*)

I come now to apply what has been ſaid to the various natures of capital crimes.

If a man in his ſound memory commits a capital offenſe, and before his arraignment he becomes abſolutely mad, he ought not by law to be arraigned during ſuch his phrenzy, but be remitted to priſon until that incapacity be removed; the reaſon is, becauſe he cannot adviſedly plead to the indictment; and this holds as well in caſes of treaſon, as felony,

I even

(*n*) Vide *Leg. Alfredi*, *l.* 14. *B. Corone* 101 & 217.

(*o*) According to 43 *Aſſiſ. pl.* 30. and 8 *H.* 4. 2. if a priſoner ſtands mute, it ſhall be inquired, whether it be wilful or by the act of God, from whence *Crompton* infers, that if it be by the act of God, he ſhall not ſuffer. *Crompt. Juſt.* 29. *a.* but if one, who is both deaf and dumb, may diſcover by ſigns, that he hath the uſe of underſtanding, much more may one, who is only dumb, and conſequently may be guilty of felony, *ſed quære*, how he ſhall be arraigned.

even tho the delinquent in his ſound mind were examined, and confeſſed the offenſe before his arraignment: and this appears by the ſtatute of 33 *H.* 8. *cap.* 20. which enacted a trial in caſe of treaſon after examination in the abſence of the Party; but this ſtatute ſtands repeald by the ſtatute of 1 & 2 *Phil. & Mar. cap.* 10. *Co. P. C. p.* 6. And if ſuch perſon after his plea, and before his trial, become of *non ſane memory*, he ſhall not be tried; or, if after his trial he become of *non ſane memory*, he ſhall not receive judgment; or, if after judgment he become of *non ſane memory*, his execution ſhall be ſpared; for were he of ſound memory, he might allege ſomewhat in ſtay of judgment or execution. *Co. P. C.* 4. (*p*)

But becauſe there may be great fraud in this matter, yet if the crime be notorious, as *treaſon* or *murder*, the judge before ſuch reſpite of trial or judgment may do well to impanel a jury to inquire *ex officio* touching ſuch infanity, and whether it be real or counterfeit.

If a perſon of *non ſane memory* commit *homicide* during ſuch his infanity, and continue ſo till the time of his arraignment, ſuch perſon ſhall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the king's grace to pardon him. 26 *Aſſ.* 27. 3 *E.* 3. *Corone* 351.

But it ſeems in ſuch a caſe it is prudence to ſwear an inqueſt *ex officio* to inquire touching his madneſs, whether it was feignd; and thus it was done in the caſe of 3 *E.* 3. and in *Somervil's* caſe, *Anderſon's Rep. par.* 1. *n.* 154. But in caſe a man in a phrenzy happen by ſome overſight, or by means of the gaoler to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial, that he is mad, the judge in diſcretion may diſcharge the jury of him, and remit him to gaol to be tried after the recovery of his underſtanding, eſpecially in caſe any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vitæ*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his infanity at the time of the fact committed, then upon the ſame favour of life and liberty it is fit it ſhould be proceeded in the trial, in order

(*p*) See Sir *John Hawles's* remarks on *Bateman's* trial. *State Trials, Vol.* 4. *p.* 205.

order to his acquittal and enlargement. If a perſon during his inſanity commit *homicide* or *petit treaſon*, and recover his underſtanding, and being indicted and arraigned for the ſame pleads *not guilty*, he ought to be acquitted; for by reaſon of his incapacity he cannot act *felleo animo*. 12 *H.* 5. *Dower* 183. *Forfeiture* 33. 21 *H.* 7. 31. *b. il alera quire*, that is, ſhall be found not guilty.

And it is all one, whether the phrenzy be fixd and permanent, or whether it were temporary by force of any diſeaſe, if the fact were committed while the party was under that diſtemper.

In the year 1668. at *Aylesbury* a married woman of good reputation being deliverd of a child, and having not ſlept many nights fell into a temporary phrenzy, and kild her infant in the abſence of any company; but, company coming in, ſhe told them, ſhe had kild her infant, and there it lay; ſhe was brought to gaol preſently, and after ſome ſleep ſhe recovered her underſtanding, but marvelled how or why ſhe came thither; ſhe was indicted for murder, and upon her trial the whole matter appearing it was left to the jury with this direction, that if it did appear, that ſhe had any uſe of reaſon when ſhe did it, they were to find her guilty; but if they found her under a phrenzy, tho by reaſon of her late delivery and want of ſleep, they ſhould acquit her; that had there been any occaſion to move her to this fact, as to hide her ſhame, which is ordinarily the caſe of ſuch as are delivered of baſtard children and deſtroy them; or if there had been jealouſy in her husband, that the child had been none of his, or if ſhe had hid the infant, or denied the fact, theſe had been evidences, that the phrenzy was counterfeit; but none of theſe appearing, and the honeſty and virtuous deportment of the woman in her health being known to the jury, and many circumſtances of inſanity appearing, the jury found her not guilty to the ſatisfaction of all that heard it.

Touching the great crime of *treaſon* regularly the ſame is to be ſaid, as in caſe of *homicide*, ſuch a phrenzy or inſanity, as excuſeth from the guilt of the one, excuſeth from the guilt of the other: the reaſon is the ſame; he that cannot act *felonicè*

or *animo felonico* cannot act *proditorie*, for being under a full alienation of mind, he acts not *per electionem* or *intentionem*. This appears by the statute of 33 *H.* 8. *cap.* 20. which tho it enact, that a *non compos mentis* shall be tried for treason, yet it expresly declareth, "That if any commit high treason, "while they are in good, whole and perfect memory, and "after examination become *non compos mentis*, and that it be "certified by four of the council, that at the time of the "treason they were of good, sound and perfect memory, and "then not mad, nor lunatic, and afterwards became mad; "then they shall proceed to trial": which strongly enforceth, that a treason cannot be committed by a madman, or lunatic, during his lunacy.

And with this agrees my lord *Coke*, *P. C. p.* 6. in these words, *He that is* non compos mentis, *and totally deprived of all compassings and imaginations, cannot commit high treason by compassing or imagining the death of the king*; *for* furiosus solo furore punitur; *but it must be an absolute madness, and a total deprivation of memory.*

This tho it be general, yet the same author tells us, 4 *Rep.* 124. *b. Beverly's* case, in these words, *Mes in ascun cases non compos mentis poit committe haute treason, come si il tua, ou offer a tuer le roy.* This is a safe exception, and I shall not question it, because it tends so much to the safety of the king's person: but yet the same author, *P. C. p.* 6. tells us, that tho this was antiently thought to be law, yet it is not so now; for such a person as cannot compass the death of the king by reason of his insanity, cannot be guilty of treason within the statute of 25 *E.* 3. And thus far concerning the incapacity of ideocy, madness and lunacy.

CHAP. V.

Concerning casualty *and* misfortune, *how far it excuseth in criminals.*

I Come to the second kind of accidental defects, *viz. casualty* and *misfortune*, and to consider how far it excuseth: and first, we are to observe in this, and likewise in some other of the defects before and hereafter mentioned, a difference between civil suits, that are terminated *in compensationem damni illati*, and criminal suits or prosecutions, that are *in vindictam criminis commissi*.

If a man be shooting in the fields at rovers, and his arrow hurts a person standing near the mark, the party hurt shall have his action of trespass, and recover his damages, tho the hurt were casual (*a*); for the party is damnified by him, and the damages are but his reparation; but if the party had been kild, it had been *per infortunium*, and the archer should not suffer death for it, tho yet he goes not altogether free from all punishment (*b*). 6 *E.* 4. 7. *per Catesby.* (*c*)

As to criminal proceedings, if the act, that is committed, be simply casual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were punishable with death, is not by the laws of *England* to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act, and event, to make the offense capital.

(*a*) *Hob.* 134.

(*b*) For he forfeits all his goods and chattels. 2 *H.* 3. 18. *F. Corone* 302. 2 *Co. Inst.* 149. 3 *Co. Institt.* 220. By the antient law he was liable to make the same recompense or *weregild*, as in any other case of homicide; *e. g.* if one shooting at a mark should accidentally wound and kill another, he was nevertheless to pay his weregild. *Leg. H.* 2. *l.* 88. *l.* 90. *Legis enim est placitum, qui inscienter peccat, scienter emendet*; but by the same law, if one, who was standing on a tree, or any other place, where he was at work, should chance to fall on another passing by, he was not to pay any thing, but was deemd intirely innocent. See *Wilk. Leg. Anglo Sax. p.* 277, 279.

(*c*) *B. Corone* 148. *Trespass* 310. *F. Corone* 354.

Now, what shall be said thus simply casual, and what the punishment, will be at large considerd, when we come to homicide *per infortunium*; only something will be necessary to be said thereof here.

If a man do *ex intentione* and voluntarily an unlawful act tending to bodily hurt of any person, as by striking or beating him, tho he did not intend to kill him, but the death of the party struck doth follow thereby within the year and day (*d*); or if he strike at one, and missing him kills another, whom he did not intend, this is felony (*e*) and homicide, and not casualty or *per infortunium*.

So it is if he be doing an unlawful act, tho not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide, and not *per infortunium* (*f*); for the act was voluntary, tho the event not intended; and therefore the act it self being unlawful, he is criminally guilty of the consequence, that follows:

But if a man be doing a lawful act without intention of any bodily harm to any person, and the death of any person thereby ensues, as if he be cleaving wood, and the ax flies from the helve, and kills another, this indeed is manslaughter, but *per infortunium*; and the party is not to suffer death, but is to be pardoned of course; for it appears by the statute of *Marlbridge*, *cap.* 26. that it was not done *per feloniam* (*g*): yet

(*d*) The reason of this is, because the law doth presume, that after the year and day it cannot then be discerned, whether he died of the stroke, or a natural death. 3 *Co. Instit.* 53.

(*e*) The like in the case of malhem, if a man strike at one, and missing him malhem another. 13 *H.* 7. 14. *a.*

(*f*) 11 *H.* 7. 23. *a. per Fineux* Ch. Just. *B. Corone* 229. *Proclamation* 13. 22 *Assis. pl.* 71.

(*g*) Here our author rightly says, *it appears* by the statute of *Marlbridge*, that it was not felony, for that statute only supposes it not to be felony, but does not make that not to be felony, which was so before, as some have imagined. 2 *Co. Instit.* 148, 315. for it appears by *Magna Charta*, *cap.* 26. which was before the statute of *Marlbridge*, that he who kild another *per infortunium*, was in no danger of death. *Kel.* 123. nor indeed could it be felony, it not being done *felleo animo*. 4 *Co.* 124. *b.* The design of that statute was quite of another nature, *viz.* that the country should not be amerced where a man was kild *per infortunium*, for at that time *murdrum* peculiarly signified the secret private killing of a man; as, if he was found kild, but it was not known by whom; and thus it is defined by *Bracton*, *Lib.* III. *de corona*, *cap.* 1. to be *occulta occisio*; and in the laws of *Henry* I. *l.* 92. *murdritus homo dicebatur*, *cujus interfector nesciebatur*; and *in Dialogo de Scaccario*, *Lib.* I. *cap.* 10. *murdrum idem est*, *quod absconditum.*

yet the laws of *England* are ſo tender of the life of man, and to make men very cautious in all their actions, that the party, tho his life be ſpared, yet forfeits his goods, and muſt expect the king's grace to reſtore them.

There happend this caſe at *Peterborough*: Deer broke into the corn of *A.* and ſpoiled it in the night-time; *A.* ſets his ſervant to watch in the night with a charged gun at the corner of the field, commanding him, that, when he heard any thing ruſh into the ſtanding corn, he ſhould ſhoot at that place, for it was the deer: the maſter, who was in another corner of the field, ruſhed into the ſtanding corn; the ſervant according to his maſter's direction ſhot, and kild his maſter; it was agreed on all hands, this was neither petit treaſon, nor murder, but whether it were ſimple homicide, or *per infortunium*, was a great difficulty: Firſt, the ſhooting was lawful, when the deer came into the corn, it being no *purlieu*, nor proclaimed, or chaced deer; again, the error of the ſervant was cauſed by the maſter's direction, and his own act; but if it had been a ſtranger, that had been kild, it had been homicide, and not miſadventure: on the other ſide, the ſervant was to have taken more care, and not to have ſhot upon ſuch a token, as might have befallen a man, as well as a deer; and therefore for the omiſſion of due diligence, and better inſpection, before he adventured to ſhoot, it might amount to manſlaughter, and ſo be capital; and this ſeems to be the truer opinion.

But in the caſe of Sir *William Hawkſworth*, related by *Baker* in his chronicle of the time of *Edward* IV. *p.* 223. (*b*), he being weary of his life, and willing to be rid of it by another's hand, blamed his parker for ſuffering his deer to be deſtroyed, and commanded him, that he ſhould ſhoot the next man, that he met in his park, that would not ſtand or ſpeak; the knight himſelf came in the night into the park, and being met by the keeper refuſed to ſtand or ſpeak; the keeper ſhot, and kild him, not knowing him to be his maſter: this ſeems to be no felony, but excuſable by the ſtatute of *Malefactores in pareis* (*i*); for

(*b*) *Sub anno* 1471.

(*i*) This ſtatute was made the 22 *E.* 1. and doth expreſly enact, "That if any "parker find a treſpaſſer wandering "within

for the keeper was in no fault, but his maſter; but, had he known him, it had been murder.

As to matter of high treaſon, where the life of the king is concernd, it is not ſafe too eaſily to admit an excuſe by chance or misfortune; tho ſuch fact cannot be treaſon, that was purely caſual and involuntary, for there muſt be a *compaſſing, or imagining* to make treaſon; yet a treaſonable intention may be diſguisd under the colour of chance, and the ſafety of the king's life is of higheſt concernment.

And therefore when *Walter Tyrrel*, with a glance of an arrow from a tree involuntarily, as *Matthew Paris* (*k*) tells us, kild *William Rufus*, it could not be treaſon (*l*), becauſe there was no purpoſe of any miſchief, and he ſhot at the deer by the king's command; yet the fact was of ſuch a conſequence, that he fled for it, which was a circumſtance, that might probably infer, that there was ſome ill intention, which might make him guilty of treaſon, and not barely accident. *Co. P. C. p. 6.*

Hiſtory tells us, that upon a ſolemn juſt, or turnament appointed by *Henry* II. king of *France*, upon the marriage of his daughter, the king himſelf would needs run, and commanded the earl of *Montgomery* to run againſt him; the earl's lance breaking upon the king's cuiraſſe, a ſplinter flew into the king's eye, and hit it, whereof he died: this was not treaſon, becauſe purely accidental.

" within his liberty, intending to do damage therein, and upon cry made to " him to ſtand, he will not yield, but fleeth or defendeth himſelf with force, if " ſuch parker kill ſuch offender in endeavouring to take him, he ſhall not " be arraigned for the ſame, nor ſuffer " any puniſhment." *S. P. C.* 13. *b.*

(*k*) *p.* 54.

(*l*) *Cuſtumier de Normand. cap.* 14.

CHAP. VI.

Concerning ignorance, *and how far it prevails, to excuſe in capital crimes.*

IGnorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuſe any, that is of the age of diſcretion and *compos mentis* from the penalty of the breach of it; becauſe every perſon of the age of diſcretion and *compos mentis* is bound to know the law, and preſumed ſo to do: *Ignorantia eorum, quæ quis ſcire tenetur, non excuſat.* (*a*)

But in ſome caſes *ignorantia facti* doth excuſe, for ſuch an ignorance many times makes the act itſelf morally involuntary; and indeed many of the caſes of misfortune and caſualty mentiond in the former chapter are inſtances, that fall in with this of ignorance: I ſhall add but one or two more.

It is known in war, that it is the greateſt offenſe for a ſoldier to kill, or ſo much as to aſſault his general: ſuppoſe then the inferior officer ſets his watch, or ſentinels, and the general to try the vigilance or courage of his ſentinels comes upon them in the night in the poſture of an enemy, (as ſome commanders have too raſhly done) the ſentinel ſtrikes, or ſhoots him, taking him to be an enemy; his ignorance of the perſon excuſeth his offenſe.

In the caſe of *Levet* indicted for the death of *Frances Freeman*, the caſe was, that *William Levet* being in bed and aſleep in the night his ſervant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the ſervant going to let out *Frances* thought ſhe heard thieves breaking open the door; ſhe therefore ran up ſpeedily to her maſter, and informed him, that ſhe thought thieves were breaking open the door; the maſter riſing ſuddenly, and taking

(*a*) *Plowd.* 343. *a.*

king a rapier ran down ſuddenly; *Frances* hid herſelf in the buttery, leſt ſhe ſhould be diſcoverd; *Lever*'s wife ſpying *Frances* in the buttery, cried out to her huſband, "*Here they* "*be, that would undo us.*" *Lever* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thruſting with his rapier before him hit *Frances* in the breaſt mortally, whereof ſhe inſtantly died. This was reſolved to be neither murder, nor manſlaughter, nor felony. *Vide* this caſe cited by juſtice *Jones*, P. 15 *Car.* 1. *B. R. Cro. Car.* 538. *Cook*'s caſe.

CHAP. VII.

Touching incapacities, or excuſes by reaſon of civil ſubjection.

I Come now to thoſe incapacities, which I have ſtyled civil, and to conſider, how far they indemnify and excuſe in criminals, and criminal puniſhments.

And firſt concerning that, which ariſeth by reaſon of civil ſubjection.

And this civil ſubjection is principally of the ſubject to his prince, the ſervant to his maſter, the child to his parent, and the wife to her huſband. Somewhat I ſhall ſay of each of theſe:

I. As to the *firſt* of theſe ſubjections, the *ſubject* to his *prince*; it is regularly true, that the law preſumes, the king will do no wrong, neither indeed can do any wrong (*a*); and therefore, if the king command an unlawful act to be done, the offenſe

(*a*) *Co. Lit.* 19. *b.*

fenſe of the inſtrument is not thereby indemnified (*b*); for tho the king is not under the coercive power of the law, yet in many caſes his commands are under the directive power of the law, which conſequently makes the act itſelf invalid, if unlawful, and ſo renders the inſtrument of the execution thereof obnoxious to the puniſhment of the law. Vide *Stamf. P. C.* 102. *b.* (*c*); yet in the time of peace, if two men combat together at barriers, or for trial of ſkill, if one kill the other, it is homicide; but if it be by the command of the king, it is ſaid (*d*), it is no felony. 11 *H.* 7. 23. *a.*

II. As touching the civil ſubjection of the *child*, or *ſervant*; if either of them commit an act, which in itſelf is treaſon, or felony, it is neither excuſed nor extenuated as to the point of puniſhment by the command of his maſter, or parent; for the command is void and againſt law, and doth not protect either the commander or the inſtrument, that executes it by ſuch command. (*e*)

III. As to the civil ſubjection of the *wife* to the *husband*: tho in *many* caſes the command, or authority of the huſband, either expreſs or implied, doth not privilege the wife from capital puniſhment for capital offenſes; yet in *ſome* caſes the indulgence of the law doth privilege her from capital puniſhment for ſuch offenſes, as are in themſelves of a capital nature; wherein theſe enſuing differences are obſervable.

1. If a *feme covert* alone without her huſband, and without the coercion of her huſband, commit treaſon, or felony, tho it be but larciny, ſhe ſhall ſuffer the like judgment and execution, as if ſhe were *ſole*; this is agreed on all hands. *Stamf. P. C. Lib.* I. *cap.* 19. 15 *E.* 2. *Corone* 383.

2. But

(*b*) As if one man arreſt another merely by the king's commandment, that ſhall be no excuſe to him, but he is nevertheleſs liable to an action of falſe impriſonment. 16 *H.* 6. *F. Monſtrauns de faits* 182. 1 *H.* 7. 4. *b. B. Prerogative* 139.

(*c*) *Vide Bracton, Lib.* III. *De actionibus, cap.* 9.

(*d*) *Per Fineux* Ch. Juſt. but *Broke* in his abridgment of this caſe, *Corone* 229. ſays, that other juſtices in the time of *Henry* VIII. denied this opinion of *Fineux*, and held, that it was felony to kill a man in juſting and the like, notwithſtanding the commandment of the king; for that the commandment is againſt law. 3 *Co. Inſt.* 56, 160.

(*e*) *Dalt. Juſt. cap.* 157. *N. Edit.*

2. But if ſhe commit larciny by the coercion of the huſband, ſhe is not guilty. 27 *Aſſ.* 40. (*f*); and according to ſome, if it be by the command of her huſband. *Ibid.* (*g*), which ſeems to be law, if her huſband be preſent (*h*); but not if her huſband be abſent at the time and place of the felony committed.

3. But this command or coercion of the huſband doth not excuſe in caſe of treaſon, nor of murder, in regard of the heinouſneſs of thoſe crimes. Mr. *Dalton's Juſt. Ca.* 104. (*i*). And hence it was, that in the caſes of the treaſons committed by *Arden* and *Somerville* (*k*) againſt queen *Elizabeth* both their wives were attaint of high treaſon, tho their execution was ſpared; and yet they were only aſſenters to their huſbands treaſons, and not immediately actors in it, and ſo were principals in the ſecond degree; and upon the ſame account the earl of *Somerſet* and his wife were both attaint, as acceſſaries before, in the murder and poiſoning of Sir *Thomas Overbury*. (*l*)

4. If the huſband and wife together commit larciny or burglary, by the opinion of *Bracton*, *Lib.* III. *cap.* 32. §. 10. (*m*) both are guilty; and ſo it hath been practiſed by ſome judges. *vide Dalt. ubi ſupra, cap.* 104. and poſſibly in ſtrictneſs of law, unleſs the actual coercion of the huſband appear, ſhe may be guilty in ſuch a caſe; for it may many times fall out, that the huſband doth commit larciny by the *inſtigation*, tho he cannot in law do it by the *coercion* of his wife; but the later practice hath obtaind, that if the huſband and wife commit burglary and larciny together, the wife ſhall be acquitted, and the huſband only convicted; and with this agrees the old book, 2 E. 3. *Corone* 160. and this being the modern practice and *in favorem vitæ* is fitteſt to be followed; and the rather, becauſe otherwiſe for the ſame felony the huſband may be ſaved by the benefit of his clergy, and the

157.

(*f*) *F. Corone* 199. *Bracton de corona, cap.* 32. §. 9.

(*g*) *Quoniam ipſa ſuperiori ſuo obedire debet. Leg. Inæ, l.* 57. *B. Corone* 108.

(*h*) Becauſe the law ſuppoſes her to be then under the coercion of her huſband. *Kel.* 31.

(*i*) *N. Edit. cap.* 257.

(*k*) 1 *And.* 104.

(*l*) *Stat. Trials, Vol.* I. *Tr.* 28 & 29.

(*m*) And *Sect.* 9. and *Fleta, Lib.* I. *cap.* 38. §. 12, 13, 14. eſpecially, *Si furtum inveniatur ſub Clavibus Uxoris. Vide Bracton & Fleta, ibid.* and *LL. Canti. l.* 74.

wife hanged, where the caſe is within clergy (*n*); tho I confeſs this reaſon is but of ſmall value, for in manſlaughter committed jointly by huſband and wife the huſband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

And accordingly in the modern practice, where the huſband and wife, by the name of his wife, have been indicted for a larciny, or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the huſband acquitted; merciful judges have uſed to reprieve the wife before judgment, becauſe they have thought, or at leaſt doubted, that the indictment was void againſt the wife, ſhe appearing by the indictment to be a wife, and yet charged with felony jointly with her huſband.

But this is not agreeable to law, for the indictment ſtands good againſt the wife in as much as every indictment is as well ſeveral, as joint; and as upon ſuch an indictment the wife may be acquitted, and the huſband found guilty, ſo *è converſo* the wife may be convicted, and the huſband acquitted; for the indictment is in law joint, or ſeveral, as the fact happens; and ſo is the book of 15 *E.* 2. *Corone* 383. and accordingly has been the frequent practice. *vide Dalt. ubi ſup. cap.* 104. where there are ſeveral inſtances of the arraigning of huſband and wife upon a joint indictment of felony; which, if by law ſhe could not be any way guilty, had been erroneous, for the indictment itſelf had been inſufficient: therefore, tho the former practice be merciful, and cautious, it is not agreeable to law; for, tho ordinarily according to the modern practice the wife cannot be guilty, if the huſband be guilty of the ſame larciny or burglary; yet, if the huſband upon ſuch an indictment be acquitted, and the wife convict, judgment ought to be given againſt her upon that indictment; for every indictment of that nature is joint or ſeveral as the matter falls out upon the evidence. *Vide* 22 *E.* 4. 7. (*o*)

5. But

(*n*) The reaſon of this is, becauſe a woman cannot by law have the benefit of the clergy. 11 *Co.* 29. *b.* yet in *Fitz. Corone* 461. it was admitted, that a woman might claim clergy; however, as the law now ſtands, ſhe may in all caſes have the ſame benefit by the ſtatute of 5 & 4 *W. & M. cap.* 9. §. 7. as a man may by his clergy.

(*o*) *B. Chartre de pardon* 51.

5. But if the huſband and wife together commit a treaſon, murder, or homicide, tho ſhe only aſſented to the treaſon, they ſhall be both found guilty, and the wife ſhall not be acquitted upon the preſumption, that it was by the coercion of the huſband, for the odiouſneſs, and dangerous conſequence of the crime; the ſame law it is, if ſhe be acceſſary to murder before the fact.

6. If the huſband commit a felony or treaſon, and the wife knowingly receive him, ſhe ſhall neither be acceſſary after as to the felony, nor principal as to the treaſon, for ſuch bare reception of her huſband; for ſhe is *ſub poteſtate viri*, and ſhe is bound to receive her huſband; but otherwiſe it is, of the huſband's receiving the wife knowingly after an offenſe of this nature committed by her. (*p*)

" *M.* 37 *E.* 3. *Rot.* 34. *Linc. coram Rege.* Ricardus Dey *&*
" Margeria *Uxor ejus indictati pro receptamento felonum*; Margeria
" *dicit, quod indictamentum predict' ſuper predictam* Margeriam
" *factum minus ſufficiens eſt, eo quod pred* Margeria *tempore*
" *quo ipſa dictos felones recepiſſe, ſeu eis conſentire debuiſſet,*
" *fuit coverta pred.* Ricardo *viro ſuo, & adhuc eſt, & cum*
" *viro ſub poteſtate ſua, cui ipſa in nullo contradicere potuit;*
" *& ex quo non inferitur in indictamento predicto, quod ipſa ali-*
" *quod malum fecit, nec eis conſentivit, ſeu ipſos felones recep-*
" *tavit, ignorante viro ſuo, petit judicium, ſi ipſa, vivente viro*
" *ſuo, de aliquo receptamento in preſentia viri ſui occaſionari*
" *poſſit.*——*Poſtea viſo & diligenter examinato indictamento præ-*
" *dicto ſuper prefatam* Margeriam *facto, videtur curie, quod*
" *indictamentum illud minus ſufficiens eſt ad ipſam inde ponere*
" *reſponſuram: Ideo ceſſet proceſſus verſus eam omnino, &c.*"

Upon which record theſe things are obſervable:

1. That the wife, if alone and without her huſband, may be acceſſary to a felony *poſt factum*. 2. But ſhe cannot together with her huſband be acceſſary to a felony *poſt factum*; for it ſhall be intirely adjudged the act of the huſband; and this is partly the reaſon, why ſhe cannot be acceſſary in receipt of her huſband being a felon, becauſe ſhe is *ſub poteſtate viri*.

3. That

(*p*) *Co. P. C.* 108.

3. That in this caſe ſhe was not put to plead to the indictment *not guilty*, but took her exception upon the indictment itſelf; and ſo *note* the diverſity between an indictment of felony, as principal, and the indictment of her, as acceſſary after; for in the former caſe ſhe ſhall be put to plead *not guilty* to the indictment, tho it appear in the body thereof, that ſhe is *covert*. 4. That yet the indictment ſtood good, as to the huſband; and upon this conſideration, tho it is true the huſband and wife may be guilty of a treaſon, as is before ſhewn, yet it ſeems, ſhe ſhall never be adjudged a traitor barely for receiving her huſband, that is a traitor, or for receiving jointly with her huſband any other perſon, that is a traitor, unleſs ſhe were alſo conſenting to the treaſon, for it ſhall be intirely adjudged the act of her huſband.

It is certain, a *feme covert* may be guilty of miſpriſion of treaſon committed by another man than her huſband; but whether ſhe can be guilty of miſpriſion of treaſon, if ſhe knows her huſband's treaſon, and reveal it not, is a caſe of ſome difficulty: on the one ſide the great obligation of duty ſhe owes to the ſafety of the king and kingdom, the horridneſs of the offenſe of treaſon, and the great danger, that may enſue by concealing it, ſeems to render her guilty of miſpriſion of treaſon, if ſhe ſhould not detect it; on the other ſide, it may be ſaid, ſhe is *ſub poteſtate viri*, ſhe cannot by law be a witneſs againſt her huſband, and therefore cannot accuſe him. *Ideo quære.* But certainly, if ſhe conſented to the treaſon of her huſband, tho he were the only actor in it, ſhe is guilty as a principal, and hath no privilege herein by her coverture, as is before ſhewn.

CHAP. VIII.

Concerning the civil incapacities by compulſion *and* fear.

I join theſe two incapacities together, becauſe they are much of the ſame nature, as to many purpoſes; and how far theſe give a privilege, exemption, or mitigation in capital puniſhments, is now to be conſidered.

Firſt, There is to be obſervd a difference between the times of war, or public inſurrection, or rebellion, and the times of peace; for in the times of war, and public rebellion, when a perſon is under ſo great a power, that he cannot reſiſt or avoid, the law in ſome caſes allows an impunity for parties compeld, or drawn by fear of death, to do ſome acts in themſelves capital, which admit no excuſe in the time of peace.

M. 21 E. 3. *coram Rege. Rot.* 101. *Lint.* "*Walter de Alyngton*, and divers of his confederates at St. *Botolph's* "*Regiam poteſtatem aſſumentes, & ut de Guerrâ inſurgentes,* "*quendam Thomam de Okeham ſutorem in capitaneum, & majorem ſuum eligerunt*", ſeized on two ſhips, and took away the corn (*a*); appointed a bell to be rung (*b*); and commanded, that at the ringing thereof *ipſi & eorum quilibet eſſent parati, &c.* "*Et plures homines ville predicte, qui ad maleficia* "*ſua conſentire noluerunt, ceperunt, & eos ſibi jurare fecerunt* "*ad impriſas ſuas manutenendas.*" They were arraigned upon the indictment, and committed: "*Illi, qui coacti fuerunt* "*jurare, dimittuntur per manucaptionem; & illi, qui receperunt* "*denarios, petunt quod, ex quo patet per indictamentum præ-*"*dictum, quod ipſi coacti fuerunt recipere denarios contra voluntatem ſuam, petunt, quod poſſint quieti recedere; & conſide-*

(*a*) One hundred and twenty quarters of corn, value 36 *l.*

(*b*) *Quandam communem campanam ordinaverunt pulſari.*

" *ratum eſt per curiam, quod nihil mali in his reperitur; ſed*
" *quia curia nondum adviſatur, dies datus eſt per manucaptionem;*
" *ideo venit jurata.*" I find no further proceeding againſt them.

M. 7 *H.* 5. *coram Rege. Rot.* 20. *Heref.* cited *Co. P. C. p.* 16. Thoſe, that ſupplied with victuals Sir *John Oldcaſtle*, and his accomplices then in rebellion, as is ſaid, were acquitted by judgment of the court; becauſe it was found to be done *pro timore mortis, & quod receſſerunt, quam cito potuerunt:* note, it was only furniſhing of victuals, and *pro timore mortis*, which excuſed them: for after the battle of *Eveſham* in 49 *H.* 3. when that prudent act was made for the ſettling of the kingdom, called *Dictum de Kenilworth*, thoſe, that were drawn to aſſiſt the barons againſt the king, tho they were not put into the rank of thoſe, that paid five years value, of their lands for their aſſiſtance, *viz.* thoſe, that *gratis, & voluntarie, & non coacti miſerunt ſervitia ſua contra regem, & ejus filium* (c); yet, it ſeems, they were put to a ſmaller mulct; for by the 12th, 13th, 14th, and 15th articles: " *Coacti, vel me-*
" *tu ducti, qui venerunt ad bella, nec pugnaverunt, nec male*
" *fecerunt; impotentes, qui vi vel metu coacti miſerunt ſervi-*
" *tia ſua contra regem, vel ejus filium; coacti, vel metu ducti,*
" *qui fuerunt depredatores, & cum principalibus predonibus pre-*
" *dationes fecerunt, & quando commodè potuerunt, receſſerunt,*
" *& ad domos redierunt;* [*emptores ſcienter rerum alienarum*
" *valorem bonorum, quæ emerunt, reſtituant, & in miſericor-*
" *dia domini regis ſint, quia contra juſtitiam fecerunt, quia rex*
" *inhibuit, jam dimidio anno elapſo;*] *illi, qui ad mandatum comi-*
" *tis Leyceſtriæ ingreſſi ſunt Northampton, nec pugnaverunt, nec*
" *malum fecerunt, ſed ad Eccleſiam fugerunt, quando regem veni-*
" *entem viderunt, & hoc ſit attinctum per bonos, ſolvant,*
" *quantum valet terra eorum per dimidium annum; illi, qui ex*
" *feodo comitis tenebant, ſint ſolum in miſericordia domini regis:*
impotentes,

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(c) Nor into the rank of thoſe, who by lies and falſhood had drawn off others to the earl of *Leiceſter*'s party, and were puniſhed with a mulct of two years value, as by *Artic.* 11. " Laici manifeſte " procurantes negotia comitis Leyceſtriæ " & complicium ſuorum, attrahendo homines per mendacia & falſitates, inſtigando parti comitis & ſuorum, detrahendo parti regis & filii ſui, puniantur " per quantum valet terra eorum per " duos annos."

" *impotentes, & alii homines, qui nihil mali fecerunt, ſtatim* " *rehabeant terras ſuas, & damna recuperent in curia domini* " *regis.*"

But even in ſuch caſes, if the whole circumſtances of the caſe be ſuch, that he can ſufficiently reſiſt, or avoid the power of ſuch rebels, he is inexcuſable, if upon a pretence of fear, or doubt of compulſion, he aſſiſt them.

Now as to times and places of peace.

If a man be menaced with death, unleſs he will commit an act of treaſon, murder, or robbery, the fear of death doth not excuſe him, if he commit the fact; for the law hath provided a ſufficient remedy againſt ſuch fears by applying himſelf to the courts and officers of juſtice for a writ or precept *de ſecuritate pacis.* (*d*)

Again, if a man be deſperately aſſaulted, and in peril of death, and cannot otherwiſe eſcape, unleſs to ſatisfy his aſſailant's fury he will kill an innocent perſon then preſent, the fear and actual force will not acquit him of the crime and puniſhment of murder, if he commit the fact; for he ought rather to die himſelf, than kill an innocent: but if he cannot otherwiſe ſave his own life, the law permits him in his own defenſe to kill the aſſailant; for by the violence of the aſſault, and the offenſe committed upon him by the aſſailant himſelf, the law of nature, and neceſſity hath made him his own *protector cum debito moderamine inculpatæ tutelæ,* as ſhall be farther ſhewed, when we come to the chapter of homicide *ſe defendendo.* (*)

But yet farther, it is true in caſes of war between ſovereign princes the law of nations allows a prince to begin hoſtility with ſuch a prince, that deſigns a war againſt him; and if the fear be real, and upon juſt ground, *non tantum de potentiâ ſed & de Animo. Grot. de jure belli & Pacis, Lib.* II. *cap.* 22. §. 5. he may prevent the other's actual aggreſſion, and need not expect, till the other actually invade him, when poſſibly it may be too late to make a ſafe defenſe; and the reaſon is, becauſe they are not under any ſuperior, that may by

(*d*) See this writ in the *Regiſter, fol.* 88. *b. F. N. B. Vet. Edit.* 79. *N. Edit.* 177.
(*) *Poſtea cap.* 33.

by his proceſs or interpoſition ſecure the prince againſt ſuch a juſt fear; and therefore in ſuch caſe the law of nations allows a prince to provide for his own ſafety.

But it is otherwiſe between ſubjects of the ſame prince: If *A.* fears upon juſt grounds, that *B.* intends to kill him, and is aſſured, that he provides weapons, and lies in wait ſo to do; yet without an actual aſſault by *B.* upon *A.* or upon his houſe, to commit that fact, *A.* may not kill *B.* by way of prevention; but he muſt avoid the danger by flight, or other means; for a bare fear, tho upon a juſt cauſe, and tho it be upon a fear of life, gives not a man power to take away the life of another, but it muſt be an actual and inevitable danger of his own life; for the law hath provided a ſecurity for him by flight, and recourſe to the civil magiſtrate for protection by a writ or precept *de ſecuritate pacis*: and thus far touching the privilege by reaſon of compulſion or fear.

CHAP. IX.

Concerning the privilege by reaſon of neceſſity.

ALtho all compulſion carry with it ſomewhat of neceſſity, and abates ſomewhat of the voluntarineſs of the act that is done, yet there are ſome kinds of neceſſities, that are not by any external compulſion or force.

Touching the neceſſity of ſelf-preſervation againſt an injurious aſſault ſomewhat hath been ſaid in the laſt chapter, and more will be ſaid hereafter in its due place: I ſhall proceed therefore to other inſtances.

The neceſſity of the preſervation of the peace of the kingdom by the apprehending notorious malefactors excuſeth ſome acts from being felony, which in the matter of them without ſuch neceſſity were felony.

If a thief reſiſt, and will not ſuffer himſelf to be taken upon hue and cry or purſuit, *juſticiari ſe nolit permittere*, if he be kild by the purſuants, it is no felony (*a*); *de quo vide latius infra.*

By the ſtatutes of 3 & 4 *E.* 6. *cap.* 5. and 1 *Mar. cap.* 12. If there be a riotous aſſembly to the number of twelve aſſembled to commit the diſorders mentioned in thoſe acts, the juſtices of peace, the ſheriff, mayor, or other officer of any corporation, *&c.* may raiſe a power to ſuppreſs and apprehend them; and, if they diſperſe not upon proclamation, if any of the rioters be kild, or maimed, or hurt by the juſtices, *&c.* or thoſe aſſembled by them to ſuppreſs the riot, it is by this act diſpuniſhable.

It is true, this act (*b*) continued only during queen *Elizabeth*'s life, and is now expired (*c*); but altho, perchance, as to the killing of ſuch perſons, as do not preſently return upon proclamation to their homes, it needs the aid of an act of parliament to indemnify them; yet if they attempt any riotous act, and cannot be otherwiſe ſuppreſt, the ſheriff, or juſtice of peace may make uſe of ſuch a force upon them for preſervation of the peace, as well by the Common law, as by the ſtatute; *quod vide in Anderſon*'s *Rep. part* 2. *n.* 49. *p.* 67. *Burton*'s caſe *in fine*; and the ſtatute of 13 *H.* 4. *cap.* 7. *in principio*, and 2 *H.* 5. *cap.* 8. whereby all men are bound upon warning to be aſſiſtant to the ſheriff and juſtice for the ſuppreſſing of riots even by force, if it cannot be otherwiſe effected; ſo that the clauſes touching this matter in the temporary ſtatutes of 3 & 4 *E.* 6. and 1 *Mar.* are but purſuant to the law and former ſtatutes for neceſſity of preſerving the peace.

(*a*) See *Leg. Inæ*, *l.* 35.

(*b*) *viz.* 1 *Mar. cap.* 12. for 3 & 4 *Ed.* 6. *cap.* 5. was repeald by 1 *Mar. cap.* 12.

(*c*) It was at firſt made to continue only till the end of the next ſeſſion, but was afterwards by ſeveral new acts continued during the life of queen *Mary*; and by 1 *Eliz. cap.* 16. was continued during her life alſo, and has never ſince been revived; but in 1 *Geo.* 1. *cap.* 5. a new act was made to much the ſame purpoſe, which is perpetual.

Some of the caſuiſts, and particularly *Covarruvias*, *Tom.* I. *De furti & Rapinæ reſtitutione*, §. 3, 4. *p.* 473. and *Grotius de jure belli ac pacis*, *Lib.* II. *cap.* 2. §. 6. (*d*), tell us, that in caſe of extreme neceſſity, either of hunger or clothing, the civil diſtributions of property ceaſe, and by a kind of tacit condition the firſt community doth return, and upon this thoſe common aſſertions are grounded; "*Quicquid neceſſitas* "*cogit, defendit.*" "*Neceſſitas eſt lex temporis & loci.*" "*In caſu extremæ neceſſitatis omnia ſunt communia:*" and therefore in ſuch caſe theft is no theft, or at leaſt not puniſhable, as theft; and ſome even of our own lawyers (*e*) have aſſerted the ſame; and very bad uſe hath been made of this conceſſion by ſome of the Jeſuitical caſuiſts in *France*, who have thereupon adviſed apprentices, and ſervants to rob their maſters, when they have judged themſelves in want of neceſſaries, of clothes, or victuals; whereof, they tell them, they themſelves are the competent judges; and by this means let looſe, as much as they can, by their doctrine of probability, all the ligaments of property and civil ſociety.

I do therefore take it, that, where perſons live under the ſame civil government, as here in *England*, that rule, at leaſt by the laws of *England*, is falſe; and therefore, if a perſon being under neceſſity for want of victuals, or clothes, ſhall upon that account clandeſtinely, and *animo furandi* ſteal another man's goods, it is felony (*f*), and a crime by the laws of *England* puniſhable with death; altho the judge, before whom the trial is, in this caſe (as in other caſes of extremity) be by the laws of *England* intruſted with a power to reprieve the offender before or after judgment in order to the obtaining the king's mercy.

For 1. Mens properties would be under a ſtrange inſecurity, being laid open to other mens neceſſities, whereof no man can poſſibly judge, but the party himſelf.

2. Becauſe by the laws of this kingdom (*g*) ſufficient proviſion is made for the ſupply of ſuch neceſſities by collections for

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(*d*) See *Puff. de jure naturæ*, *Lib.* II. *cap.* 6. §. 6.
(*e*) *Briton*, *cap.* 10. *Crompt.* 33. *a.* *Plowd.* 18. *b.* 19. *a.* *Dalt. Juſt. cap.* 99.
(*f*) See *Dalton ubi ſupra.*
(*g*) 43 *Eliz. cap.* 2. *&c.*

for the poor, and by the power of the civil magiſtrate; and conſonant hereunto ſeems to be the law even among the *Jews*, if we may believe the wiſeſt of kings. *Proverbs* vi. 30, 31. "*Men do not deſpiſe a thief, if he ſteal to ſatisfy his ſoul, when* "*he is hungry; but if he be found, he ſhall reſtore ſeven-fold,* "*and ſhall give all the ſubſtance of his houſe.*" It is true, death was not among them the penalty of theft, yet his neceſſity gave him no exemption from the ordinary puniſhment inflicted by their law upon that offenſe. (*b*)

Indeed this rule, "*in caſu extremæ neceſſitatis omnia ſunt* "*communia,*" does hold in ſome meaſure in ſome particular caſes, where by the tacit conſent of nations, or of ſome particular countries or ſocieties, it hath obtaind.

1. Among the *Jews* it was lawful in caſe of hunger to pull ears of ſtanding corn, and eat, *Matth.* xii. 1. *&c.* (*i*) and for one, that paſſed through a vineyard, or oliveyard, to gather, and eat without carrying away. *Deut.* xxiii. 24, 25.

2. By the *Rhodian* law (*k*), and the common maritime cuſtom, if the common proviſion for the ſhip's company fail, the maſter may under certain temperaments break open the private cheſts of the mariners or paſſengers, and make a diſtribution of that particular and private proviſion for the preſervation of the ſhip's company. *Vide Conſolato del Mare, cap.* 256. (*l*) *Le cuſtomes de la Mere, p.* 77.

3. Nay, I find, among our *Engliſh* voyages to the *Weſt-Indies* deſcribed by *Hackluit*, that it was a received cuſtom, that if a ſhip wanted neceſſaries, and the inhabitants of the continent would not furniſh them for money, they might, by the uſage of the ſea and nations take proviſion by force, making the inhabitants reaſonable ſatisfaction; for in theſe caſes the common conſent of nations hath made it lawful, and therefore it is lawful; 1. becauſe neceſſary in extremity, 2. be-

(*b*) But their ordinary puniſhment being only pecuniary could affect him only, when he was in a condition to anſwer it; and therefore the ſame reaſons, which would juſtify that, can by no means be extended to a corporal, much leſs to a capital puniſhment.

(*i*) For the *Phariſees* objected againſt it only on account of its being done on the *ſabbath-day*, *Mark* xi. 23, *&c. Luke* vi. 1, *&c.*

(*k*) *Vide Dig. Lib.* XIV. *tit.* 2. *de lege Rhodia de jactu, l.* 2. §. 2. *in fine. Leg. Gulielmi Conqueſt. cap.* 38.

(*l*) Printed at *Venice* 1584. in 4to.

2. becauſe there are no other means to obtain it by an application to ſuperiors; but were this done by *Engliſh* mariners upon the *Engliſh* ſhore, where both are under the ſame civil magiſtrate, the caſe would be otherwiſe, becauſe capable of another remedy.

It is not lawful voluntarily to aſſiſt the king's enemies with money or proviſion, for it is an adhering to the king's enemies, and ſo treaſon within the letter of the ſtatute of 25 *E.* 3. but yet, if the king's enemies come into a county with a power too ſtrong for the county to reſiſt, and will plunder the country, unleſs a compoſition be made with them, ſuch a ranſoming of themſelves is ſo far from being treaſon, that it hath been allowed as lawful. 1. In reſpect of the extreme neceſſity. 2. Becauſe it is a leſs detriment to the country, and a leſs ſupply to the enemy, than that plunder would be; and for that purpoſe I ſhall ſet down the caſe at large.

M. 14 *E.* 2. *B. R. Rot.* 60. *Dunelm.* "Placitum de tranſ-
" greſſ. coram *A. D. de Brome* & ſociis ſuis juſticiariis domini
" regis in epiſcopatu *Dunelm.* ſede vacante anno decimo regni
" ſui mittitur huc propter errores, &c. Juratores dicunt, quod
" Scoti inimici & rebelles regis prædict. die Martis in feſto
" Sanctæ *Catharinæ* virginis anno regni regis nunc nono in-
" greſſi fuerunt terram epiſcopatus *Dunelm.* eâ de cauſâ, ut ip-
" ſam deſtruerent, & quod omnes de communitate epiſcopatus
" prædicti tunc apud *Dunelm.* exiſtentes, volentes præcavere
" dictorum inimicorum malitiam, ordinârunt, quod unuſquiſ-
" que illorum præſtarent ſacramentum corporale ſtare ordina-
" tioni, quæ pro proficuo communitatis prædictæ continge-
" ret ordinari, qui quidem *Willielmus de Heberne* jurat' fuit
" cum aliis, &c. Item quod poſt conſuluerunt facere finem
" cum prædictis inimicis, & cum eis fecerunt finem de mille
" & ſexcent' marc'; quam quidem ſummam oporteret ſolvi
" incontinenti, per quod, quia non habuerunt pecuniam preſtò,
" ordinârunt, quod quidam de communitate prædicta irent de
" domo in domum infra ball. *Dunelm.* & extra, & perſcru-
" tarent, ubi denarii eſſent in depoſito, & ubicunq; denarii
" hujuſmodi invenirentur, caperentur ad ſolutionem dicti
" finis feſtinand', quouſq; levari poſſit de communitat. prædict.

" & ſatisfieri illis, quorum denarii ſic capiendi fuerunt; et " quod prædictus *Willielmus de Kellawe* ſimul cum quodam " *David de Rotheber* jurat' ad perſcrutandum in formâ præ- " dictâ venit ad prædictas domos, & ciſtam & 70 l. de pro- " priis denariis ipſius *Willielmi de Heberne* in ciſta prædicta in- " ventas cepit & aſportavit, &c. et juratores requiſiti, ſi " prædictus *Willielmus de Heberne* conſentiebat captioni præ- " dictorum denariorum, dicunt, quod non, & quia comper- " tum eſt, &c. quod, ubi prædicta ordinatio fuit facta de " denariis in depoſito perſcrutand' & capiend', prædict' *Wil-* " *lielmus de Kellawe* ſimul, &c. cepit denarios prædict', qui " fuerunt in domo & propriâ cuſtodiâ prædicti *Willielmi de* " *Heberne* & contra voluntatem ſuam, & etiam pro eo, " quod videtur curiæ, quod prædict' *Willielmus de Heberne* om- " nino eſſet ſine recuperare, quoad denar' ſuos prædict', niſi " eſſet verſus præfat' *Willielmum de Kellawe*, &c. qui prædictos " denarios in formâ prædicta cepit & aſportavit, conſideratum " eſt, quod prædict. *Willielmus de Heberne* recuperet verſus præ- " dict. *Willielmum de Kellawe* prædictos denarios & dampna " ſua, quæ taxantur ad c. s. & idem *Willielmus de Kellawe* " committatur goalæ, &c. prætextu cujus recordi ad ſectam " prædicti *Willielmi de Kellawe*, aſſerentis errores & defectus in " prædictis recordo & proceſſu intereſſe, mandatum fuit e- " piſcopo *Dunelm.* quod ſcire fac' prædicto *Willielmo de He-* " *berne*, &c. qui non venit.

" Ideo proceſſum eſt ad examinationem recordi per ejus " defaltum, & aſſignat hos errores, primùm, quod nihil fecit " contra pacem regis, nec denarios illos cepit vi & armis; " maximè cum prædictus *Willielmus de Heberne* juratus fuit " ſtare ordinationi prædictæ, & quod ipſe *Willielmus de Kellawe* " per ſacramentum præhibitum injunctus fuit ſcrutari & de- " narios prædictos capere; & non eſt conſonum, quod dictus " *Heberne* recuperaret prædictos denarios & dampnum contra " aſſenſum & juramentum ſuum proprium, nec quod ipſe " *Kellawe* committeretur gaolæ.

" Item in hoc quod juſtic' fundaverunt judicium ſuum, " quod dictus *Heberne* non poſſet habere ſuum recuperare de " denariis prædictis, cum illud habere poſſet directè verſus

" communitatem virtute ordinationis & conceſſionis prædicta-
" rum, &c. ob quos errores hic in judicio recitatos conſidera-
" tum eſt, quod erronicè in primo judicio proceſſum eſt, &
" quod idem *Kellawe* a gaola deliberetur, & totus proceſſus
" evacuetur, &c."

In Paſch. 15. *Rot.* 17. " Patet, quod Scoti cum hominibus
" de *Rippon* ſimiliter concordârunt pro mille marc', nè villa
" comburetur."

Nota, this was an act done for the ſecurity of the country in a time of actual war and invaſion by enemies, and therefore rendred that by-law and the execution thereof juſtifiable by reaſon of that neceſſity, which would hardly have done it in time of peace. 2. But that, which this record principally evidenceth, is, that ſuch a ſupply of the king's enemies upon ſuch a neceſſity in a time of war, and to prevent the devaſtation of the country, was not taken at all to be an adhering to, or treaſonable aiding of the king's enemies.

CHAP. X.

Concerning the offenſe of high treaſon, *the perſon againſt whom committed, and the reaſon of the greatneſs of the offenſe; and touching* alligeance.

HAving premiſed theſe general obſervations relating to all crimes, that are capital, and their puniſhments, I ſhall now deſcend to conſider of capital crimes particularly, and therein firſt of high treaſon.

And yet, before I deſcend to the particulars thereof, I ſhall premiſe alſo ſome things in general touching alligeance, ſince the ſpecification of this offenſe conſiſts principally in this aggravation, that it is *contra ligeantiæ ſuæ debitum.*

The

The offenſe of high treaſon is an offenſe, that more immediately is againſt the perſon or government of the king; and the greatneſs of the offenſe, and the ſeverity of the puniſhment is upon theſe two reaſons.

1. Becauſe the ſafety, peace, and tranquillity of the kingdom is highly concerned in the ſafety and preſervation of the perſon, dignity, and government of the king; and therefore the laws of the kingdom have given all poſſible ſecurity to the king's perſon and government under the ſevereſt penalties.

2. Becauſe as the ſubject hath his protection from the king and his laws, ſo on the other ſide the ſubject is bound by his alligeance to be true and faithful to the king; and hence all indictments of high treaſon run *proditorie*, as a breach of the truſt, that is owing to the king, *contra ligeantiæ ſuæ debitum*, againſt that faith and alligeance he owes to the king, and *contra pacem domini regis, coronam, & dignitatem ejus.*

And hence it is, that if an alien enemy come into this kingdom hoſtilely to invade it, if he be taken, he ſhall be dealt with as an enemy, but not as a traitor, becauſe he violates no truſt nor alligeance: reſolved in the lord *Heriſe*'s caſe. *Co. P. C. cap.* 1. *p.* 11. 7 *Co. Rep.* 6. *a. Perkin Warbeck*'s caſe.

But if an alien, the ſubject of a forein prince in amity with the king live here, and enjoy the benefit of the king's protection, and commit a treaſon, he ſhall be judged and executed, as a traitor; for he owes a local alligeance. 7 *Co. Rep.* 6. *the caſe of* Stephano Ferrara (*a*) a Portugueze; and the indictment ſhall not run *contra naturalem dominum*, but *contra dominum ſuum*, and conclude *contra ligeantiæ ſuæ debitum*, and ſuch an alien was compellible to take the oath of alligeance in the leet. 2 *Co. Inſtit. p.* 121. (*b*)

If a merchant ſubject of a foreign prince in hoſtility with our king come hither, after the war begun, without the king's licence, or ſafe conduct, ſuch a perſon may be dealt with as an enemy, *viz.* taken, and ranſomed. *Mag. Chart. cap.* 30. (*c*)

By

(*a*) And *Emanuel Lewes Tinoco. Hil.* 36 *Eliz.*

(*b*) *Mirror de juſtice, cap.* 5. §. 1. *n.* 6.

(*c*) 2 *Co. Inſtit.* 58.

By that ſtatute merchants of an hoſtile country found in this realm at the beginning of the war ſhall be attached without harm to their body or goods, till it be known, how the *Engliſh* merchants are uſed in the hoſtile country; and if the *Engliſh* merchants be well uſed there, theirs ſhall be likewiſe uſed here; ſo that in this caſe ſuch merchants, tho alien enemies, have the benefit of the king's protection, and ſo owe a local alligeance, which if they violate, they may be dealt with as traitors, not as enemies, for they have the advantage of the king's protection, as well as his other ſubjects; yea, it ſeems alſo, that if the ſubject of a forein prince lives here as a private man, and then war is proclaimd betwixt our king and that forein prince, and yet that alien continues here in *England* without returning to his natural ſovereign, but under the cover and protection of the king of *England* commits a treaſon, he ſhall be judged and executed as a traitor; for by continuing here he continues the owning of his former local alligeance.

Yet for the greater ſecurity in the times of hoſtility between this and forein kingdoms, eſpecially that of *France*, there went out precepts under the great ſeal to arreſt all thoſe of that hoſtile kingdom, until they gave ſurety, *quod ſe bene gerent erga regem, & quod ſua bona non transferent ſine licentiâ regis, & quod literas aut nuncios non mittent ad partes externas, nec aliquid contra pacem attemptabunt. Rot. Vaſcon.* 18 E. II. *M.* 24, 23 & 21. *Dorſo.* And ſometimes thoſe aliens were conſtraind actually to ſwear fealty to the crown of *England* in the times of hoſtility, and thereby to ſuperadd an actual alligeance to that local alligeance, which they had being under the king's protection as ſubjects, tho in truth they were the natural ſubjects of the hoſtile prince. *Pat.* 14 *H.* 6. *part.* 2. *m.* 34 & 35. and, if they refuſed, were either impriſoned, or expelled the kingdom. *Vide infra cap.* 15.

And upon the ſame account it is, that, tho there be an uſurper of the crown, yet it is treaſon for any ſubject, while the uſurper is in full poſſeſſion of the ſovereignty, to practiſe treaſon againſt his perſon; and therefore, altho the true prince regain the ſovereignty, yet ſuch attempts againſt the

uſurper in compaſſing his death have been puniſhed as treaſon, unleſs they were attempts made in the right of the rightful prince, or in aid or aſſiſtance of him, becauſe of the breach of ligeance, that was temporarily due to him, that was king *de facto*; and thus it was done 4 *E.* 4. 9 *E.* 4. 1. (*d*) tho *H.* 6. was declared an uſurper by act of parliament 1 *E.* 4. and therefore king *Edward* IV. puniſhed *Ralph Gray* with degradation, as well as death, not only for his rebellion againſt himſelf, but alſo *pur cauſe de ſon perjury & doubleneſs, q'il avoit fait al roy H.* 6. 4 *E.* 4. 20.

And becauſe high treaſon is ſaid to be *contra ligeantiæ debitum*, it will not be amiſs to premiſe ſomething touching alligeance and its kinds, referring myſelf to 7 *Co. Rep. Calvin's* caſe, in relation to what is here omitted touching it.

Alligeance therefore due to the king is of two kinds: 1. Original, virtual, and implied. 2. Expreſt, and declard by oaths or promiſes.

The virtual or implied alligeance is that, which the ſubject owes to his ſovereign antecedently to any expreſs promiſe, oath, or engagement: this is that, which the *Cuſtumer de Normandie* mentions *cap.* 13. *Aliance & la loyaulte de tous ſes homes de toute la contrée, par quoy ils ſont tenus a lui donner conſeil & ayde de leurs propres corps contre touses perſonnes qui peuvent viver & mourir, & ſoy garder de lui nuyre en toutes choſes ne de ſouſtenir in aulcune choſe la partie de ceulx qui parlent contre luy.*

And from the breach of this original ligeance ariſeth the crime of treaſon, tho the perſon committing it never promiſed or ſwore faith or alligeance to his prince: for as the king by the very deſcent of the crown is fully inveſted with the right of ſovereignty before his coronation, (which is only a magnificent ſolemnity attending that, which is before ſettled in the prince by the deſcent of the crown,) ſo the ſubject is bound to his king by an intrinſic alligeance before the ſuperinduction of thoſe expreſs bonds of oath, homage, and fealty, which were inſtituted for the better ſecuring thereof. *Post C. L. 189.*

(*d*) It was not done in this caſe, but only it is ſaid by the counſel, that it may be done.

And this alligeance is either natural from all that are ſubjects born within the king's alligeance; or local, which obligeth all, that are reſident within the king's dominions, and partake of the benefit of the king's protection, altho ſtrangers born.

The breach of this primitive or virtual alligeance is that, which is called high treaſon; what ſhall be ſaid a breach of this alligeance, ſo as to make a perſon guilty of treaſon, ſhall be ſhewn hereafter.

The expreſs or explicite alligeance conſiſts in certain promiſes, oaths, or profeſſions atteſting and witneſſing that alligeance, and inſtituted for the farther ſecurity thereof; and they are of two kinds; firſt, thoſe, which were antiently inſtituted by the Common law, namely the oath of fidelity and alligeance, and the profeſſion of lige homage; and ſuch, as are inſtituted by act of parliament, namely the oath of ſupremacy inſtituted by the ſtatute of 1 *Eliz.* (*e*), and the oath of obedience inſtituted by the ſtatute of 3 *Jacobi* (*f*). Something I ſhall ſay of all theſe.

The oath of fidelity or fealty is of two kinds: 1. That which is due by tenure, whether of the king, or of meſne lords, which is *ratione feodi vel vaſſalagii*, and hath a ſpecial relation to the lands ſo held, and is ſet down by *Littleton*, §. 19. "Hear ye, my lord, I ſhall be faithful and loyal "and faith to you ſhall bear for the tenements, which I "claim to hold of you, and I ſhall lawfully do to you the "cuſtoms and ſervices, which I ought to do at the terms "aſſigned. *So help me God.*"

Touching this feudal fealty, or fealty by reaſon of tenure, I have not much to do in this place. The other kind of fealty is that oath, which is called *fidelitas ligea*, or *alligeance*, and performed only to a ſovereign prince; and therefore regularly ought to be performed by all men above the age of twelve years, whether they hold any lands, or not. The tenor

(*e*) *cap.* 1.

(*f*) *cap.* 4. [*vide* 7 *Jac.* I. *cap.* 2 & 6. 13 *Car.* II. *St.* 2. *cap.* 1. 13 & 14 *Car.* II. *cap.* 3 & 4. 25 *Car.* II. *cap.* 2. 30 *Car.* II. *St.* 2. *cap.* 1.] But theſe oaths are abrogated by 1 *W. & M. Seſſ.* 1. *cap.* 1 & 8. and new ones appointed in their room; ſee 1 *W. & M. Seſſ.* 2. *cap.* 2. §. 3. and 3 *W. & M. cap.* 2. 13 *W.* 3. *cap.* 6. 1 *Annæ*, *cap.* 22. 4 *Annæ*, *cap.* 8. 6 *Annæ*, *cap.* 7, 14, 23. 1 *Geo.* I. *cap.* 13, &c.

nor of this oath according to *Fleta*, *Lib.* III. *cap.* 16. (*g*) runs thus: "Hoc auditis, circumſtantes, quod fidem regi portabo "de vita, & membris, & terreno honore, & arma contra "ipſum non portabo: ſic me Deus, &c."

According to *Britton*, who wrote about 5 *E.* 1. *cap.* 29. (which is alſo mentiond in *Calvin's* caſe, 7 *Co. Rep.* 6.) the common form of the oath of alligeance taken in leets runs thus: "Ceo oyes vous *N.* bailife, que jeo *A.* de ceo jour en "avauint ſerray feal, & leal a noſtre ſeigniour *E.* roy d'Angle-"terre, & a ſes heires, & foy & lealte lui porteray de vie, & "de membre, & de terrien honour, & que jeo lour mal, ne "lour damage ne ſaveray, ne orray, que jeo ne le defendray "a mon poyer: ſi moy eyde Dieu & les ſeyntz." This is the form of the antient oath of alligeance, or fidelity to the king, and as it is uſed at this day; and he, that is minded to ſee the antiquity of it, may read thereof 7 *Co. Rep.* 6. *Calvin's* caſe, *Spelman's Gloſſ. Titulo* Fidelitas, which carry it up as high as king *Arthur*; more particularly it was eſtabliſhed by the laws of the Confeſſor (*b*), and by the laws of king *William* I. *quod vide in Spicilegiis Seldeni ad Edmerum lege* 52. (*i*) "Statuimus, ut omnes liberi homines fœdere & ſacramento "affirment, quod intra & extra univerſum regnum Angliæ "*Willielmo* regi domino ſuo fideles eſſe volunt, terras & ho-"nores illius omni fidelitate ubique ſervare cum eo & contra "inimicos & alienigenas defendere." (*k*)

And herein the prudence of the Common law is obſerva-ble; the antient oath of alligeance, 1. was ſhort, and plain, not intangled with long and intricate clauſes or declarations, but the ſenſe of it is obvious to the moſt common under-ſtanding, and yet, 2. it is comprehenſive of the whole duty of the ſubject to his prince, and therefore hath obtaind for above ſix hundred years in this kingdom; and if any diffi-culties ſhould occur in the ſenſe or extent thereof, length of time

(*g*) *ſect.* 22.

(*b*) *l.* 35. but theſe laws are evidently ſpurious, and ſeem to be the compoſition of ſome lawyer after the reign of *William* II. *Vide Hickeſii Differt. Epiſt. p.* 95. and even in the beſt *MS.* copies of theſe laws the legendary account of king *Arthur* is omitted.

(*i*) *Vide Leg. Anglo-Sax. Edit. Wilkins, p.* 228. *Edit. Lambard, p.* 170.

(*k*) *Vide Aſſiſas Henrici regis factas apud Clarendon & renovatas apud North-ampton. Hoveden, p.* 314. *Edit. Savil.*

time and long experience and practice hath ſufficiently expounded it.

I ſhall ſubjoin ſome obſervables concerning this oath, which indeed explain that implied and virtual alligeance, whereof before.

1. By whom this oath is to be taken: It is to be taken by all perſons above the age of twelve years, whether denizens or aliens, 2 *Co. Inſtit. p.* 121. except women, earls, prelates, barons, and men of religion according to *Britton, cap.* 12. which exception is not to be abſolutely and univerſally underſtood; for all perſons above the age of twelve years are bound to take this oath of alligeance, except women, as ſhall be ſhewn, but not in the ſame manner or place, as others; but becauſe regularly this oath was to be taken in the leet, or at leaſt in the ſheriff's turn, which is in nature of a leet, where earls, barons, prelates, and men of religion were not bound to do their ſuit, therefore by the ſtatute of *Marlbr. cap.* 10. is this exception added: but yet at other times and in other places men of religion and noblemen were to take it, as ſhall be ſhewn.

It differs from the oath of fealty performd to the king by tenure, for that includes ſomewhat more, and ſomewhat leſs; and according to *Britton, cap.* 68. (*l*) runs thus when performd to the king: "*Ceo oyes vous bone gents qe jeo* J.S. *foy a* "*noſtre ſeignior le roy* Edward *porterai de ceo jour en auaunt* "*de vie & de membre, de cors & de chateux, & de terrene ho-*"*nor, & les ſervices qe a lui appendent de fees & de tenements,* "*que jeo teigne de lui, leaument les ferray as termes dues a mon* "*poer: ſi moy ayde Dieu & les Seyntz, &c.*"

Now, beſides this oath of fealty or alligeance to the king, there were antiently certain oaths adminiſtred to perſons of a different age; but theſe have been long diſuſed, as namely that, which *Britton* mentions *cap.* 12. *viz.* that all above the age of fourteen years (*m*) ſhould ſwear to be true and faithful to the king, and that they ſhould not be felons nor aſſenters to felons, excepting men of religion, women, clerks, knights, and

(*l*) §. 479.

(*m*) This probably ſhould be twelve years. See 2 *Co. Inſtit.* 147. *vide ſupra in notis, p.* 24.

and their eldeſt ſons (*n*); and of the like nature was that oath appointed by king *Henry* III. to be taken by all men above fifteen years, conſiſting of divers particulars in order to the preſervation of the peace, and mentiond at large by *Bracton, Lib.* III. *Tract.* 2. *cap.* 1. *de Corona*; both which it ſeems were temporary proviſions for preſervation of the peace, and therefore adminiſtred to perſons above fourteen and fifteen years, and differd from this ſettled oath of alligeance above mentioned.

2. What kind of oath of fidelity this is: As there is *homagium ligeum*, and *homagium ſimplex*, ſo there is *fidelitas ligea* and *fidelitas ſimplex*; this, that is performd to the king, is *fidelitas ligea*, and differs from the later. 1. In that this is performd to a *king*, the other to a *meſne* lord. 2. This is performd without relation to any tenure of lands. 3. This is without exception of the fidelity to any perſon, that is always *ſalvâ fide & ligeantiâ domini regis.*

Yet there ſeems to be a double kind of lige fealty: as where there is a prince, that is ſubordinate to another, and yet hath *jura ſummi imperii* over his ſubjects, ſuch was the king of *Scots*, whilſt in ſome times of *Edward* I. and *Edward* III. he was in ſubjection to the crown of *England*; ſuch was the prince of *Wales* before the conqueſt thereof by *Edward* I. and the full union of it to the crown of *England*; and thus it was in many inveſtitutes made formerly by the kings of *England*: for inſtance *anno* 35 *H.* 3. when that king gave to his ſon *Edward* the principality of *Gaſcoigne* in *France*, ſo that the great men of that country *fecerunt ei homagium & fidelitatis juramentum*; yet *Matthew Paris* (*o*) tells us, that *dominus rex tamen ſibi retinuit principale dominium, ſcilicet ligeantiam.*

The like was done by *E.* 3. when *Rot. Vaſcon.* 36 *E.* 3. *m.* 18. the king had given to the black *Prince* the principality

(*n*) This exception ſeems not to relate to the oath, but to the being in a *decenna* or tithing. The whole paſſage runs thus: "Volons nous, que tres tous ceux de "xiiii ans de ſouthe nous facent le ſere-"ment, que ils nous ſerrount fealx & "leaux, & que ils ne ſerrount felons, ne "a felons aſſentaunts, & volons, que "touts ſoient en dizeyne, & plevys par "deſeyners, ſauve gents de religion, clers "& chivalers & lours fitz eynes, & femes." (*o*) *p.* 845.

of *Aquitain* with a regal juriſdiction, *viz. merum & mixtum imperium*, ſo that in relation to the ſubjects of *Aquitain* he was in nature of a ſovereign; yet the king not only reſerved *homagium ligeum* to be performd to him by the prince, but alſo reſerved his own ſovereignty, *viz. Dominio directo & ſuperioritate nobis ſemper ſpecialiter reſervatis:* by reaſon whereof the king did not only ſubſtitute his delegates or judges *de la ſovereignty et de reſort* to receive appeals from the prince, as appears by Mr. *Selden's Tit. Honoris, part.* 2. *cap.* 3. § 4. but was intitled to a ſuperior alligeance of all the ſubjects of *Aquitain:* ſo that here were two alligeances; one due to the prince, which was qualified and reſtrained, *ſalvâ fide regis*; and the other abſolute, which was due to the king as ſupreme.

Again, when in the year 1170. *Hen.* 2. by conſent of parliament (*p*), as it ſeems, (for otherwiſe it could not be done) made his eldeſt ſon king of *England*; ſo that there was *rex pater*, and *rex filius*, yet he reſerved to himſelf the ſupreme alligeance of all his ſubjects: " Et in craſtino coronationis il-
" lius rex pater fecit *Willielmum* regem Scotorum, & *Davidem*
" fratem ſuum, & comites, & barones regni devenire homi-
" nes novi regis, & jurare ei fidelitatem contra omnes homi-
" nes, ſalvâ fidelitate ſuâ;" Quod *vide apud Hoveden* ſub eodem anno (*q*), and the inſtrument itſelf at large *apud Brompton, p.* 1104. (*r*): " Hæc eſt conventio & finis, quæ *Williel-*
" *mus* rex Scotiæ fecit cum domino ſuo *Henrico* rege Angliæ filio
" Matildis imperatricis, viz. quod dictus *Willielmus* rex Scotiæ
" devenit *homo ligeus* domini regis Angliæ contra omnem ho-
" minem de Scotia, & de omnibus terris ſuis aliis, & *fideli-*
" *tatem* ei fecit, ut ligeo domino ſuo, ſicut alii homines ſuo
" principi facere ſolent; ſimiliter fecit *homagium Henrico* filio
" ſuo, & *fidelitatem, ſalvâ fidelitate* domini regis patris ſui,
" &c. Comites & barones de terrâ regis Scotiæ, de quibus
" dominus rex Angliæ homagium habere voluerit, facient ei
" homagium contra omnem hominem, & fidelitatem, ut
" ligeo domino ſuo, ſicut alii homines ſui ei facere ſolent, &

I " *Henrico*

(*p*) *Hoveden ſub anno* 1170. *Brompton, p.* 1061.

(*q*) *Et ſub anno* 1175.

(*r*) *Et in libro rubro ſcaccarii, fol.* CLXVI. *& Rymer's Fœdera, Vol.* I. *p.* 39. *ex magno rotulo penes Camerar'.*

" *Henrico* regi filio ſuo & hæredibus ſuis, *ſalvâ fidelitate* do-
" mini regis patris ſui."

Here was *firſt* the ſupreme king, namely *rex pater*, who did not ouſt himſelf of his regality, as ſome have miſtaken, but had the ſovereignty ſtill, for he reſerved his ligeance from the new king, and from all his ſubjects; yea, and in farther teſtimony thereof the *rex filius* in the year 1175. did his father lige homage, and ſwore alligeance *contra omnes homines*, as appears by *Hoveden*. *Secondly*, Here is a ſubordinate king, *rex filius*, who, tho in relation to his father he was a ſubject, yet in relation to his ſubjects, and particularly to the king of *Scots*, was a ſovereign. *Thirdly*, Here is yet another ſubordinate king, *William* the king of *Scots*, who was a ſovereign in relation to his ſubjects; and altho there was an alligeance or *fidelitas ligea* due by the ſubjects of *Scotland* to their king *William*, yet it was *ſalvâ fidelitate* to the kings of *England*, father, and ſon; and tho there was a lige fealty due to *rex filius*, yet it was *ſalvâ fide regis patris*; but the fidelity or alligeance to the *rex pater* was purely *fidelitas ligea*, for it had no exception.

3. The third obſervable upon this oath of alligeance is, that it is not only applicable to the politic capacity of the king, but to the perſon of the king, as well as to his office, or capacity; and for the miſapplication of the alligeance to the regal capacity or crown, excluſive of the perſon of the king, among other things the *Spencers* were baniſhed. *Vide Judicium inde in Veteri Magnâ chartâ & 7 Rep.* 11. *Calvin*'s caſe, for the oath is to be applied to the perſon of the king, as well as his crown.

4. That in all oaths of fealty, as likewiſe in the profeſſion of homage to any inferior or ſubordinate lord or prince, it muſt be *ſalvâ fide & ligeantiâ domini regis*; and to omit *this ſaving* is puniſhable in ſuch lord: ſee for this the notable record of 6 *E.* 1. againſt the biſhop of *Exeter*. *Co. Litt.* §. 85. (*ſ*), and it is no more than is uſed in other kingdoms. *Vide Spelm. in titulo* Fidelitas. The emperor *Frederic Barbaroſſa* in the year 1152. made a law, that within his empire *in omni ſa-*

cramento

(*ſ*) *p.* 65. *a. b.*

cramento fidelitatis imperator nominatim excipiatur, which obtaind preſently the like obſervation in all other countries, and accordingly is the *Cuſtumer de Normandy*, *cap.* 29. *& Gloſſa* 2*da. Ibidem.*

5. That, tho there may be due from the ſame perſon *ſubordinate* alligeances, which, tho they are not without an exception of the fidelity due to the ſuperior prince, yet are in their kind *ſacramenta ligea fidelitatis*, or ſubordinate alligeances, yet there cannot, or at leaſt ſhould not be two or more co-ordinate abſolute ligeances by one perſon to ſeveral independent or abſolute princes; for that lawful prince, that hath the prior obligation of alligeance from his ſubject, cannot loſe that intereſt without his own conſent by his ſubject's reſigning himſelf to the ſubjection of another; and hence it is, that the natural-born ſubject of one prince cannot by ſwearing alligeance to another prince put off or diſcharge him from that natural alligeance; for this natural alligeance was intrinſic and primitive, and antecedent to the other, and cannot be deveſted without the concurrent act of that prince to whom it was firſt due: indeed the ſubject of a prince, to whom he owes alligeance, may entangle himſelf by his abſolute ſubjecting himſelf to another prince, which may bring him into great ſtraits; but he cannot by ſuch a ſubjection deveſt the right of ſubjection and alligeance, that he firſt owd to his lawful prince. (*t*)

It appears by *Bracton*, *Lib.* V. *cap.* 24. (*u*), that there were very many, that had been antiently *ad fidem regis Angliæ & Franciæ*, eſpecially before the loſs of *Normandy*; ſuch were the *comes mareſcallus* that uſually lived in *England*, and *M. de Feynes manens in Franciâ*, who were *ad fidem utriuſque regis*, but they ever orderd their homages and fealties ſo, that they ſwore or profeſſed ligeance or lige homage only to one; and the homage they performd to the other was not purely *lige homage*, but rather *feudal*, as ſhall be ſhewn more hereafter: and therefore when war happend between the two crowns, *remaneat*

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(*t*) The caſe here put by our author is evidently meant of a private ſubject's ſwearing alligeance to a forein prince, and has no relation to a national withdrawing alligeance from a prince, who has abdicated the throne.

(*u*) *Tractat* 5. *De Exceptionibus.*

neat perſonaliter quilibet eorum cum eo, cui fecerat ligeantiam, & faciat ſervitium debitum ei, cum quo non ſteterat in perſonâ, namely the ſervice due from the feud or fee he holds: but this did not always ſatisfy the prince, *cum quo non ſteterat in perſonâ*, but their poſſeſſions were uſually ſeized, and rarely or not without difficulty reſtored without a capitulation to that purpoſe between the two crowns. *Vide Clauſ.* 15 *H.* 3. *m.* 21. *pro Henrico de la Vagor*, *Clauſ.* 20 *H.* 3. *m.* 1. *pro Simone Montford*, and *Placita Parl.* 18 E. 1. (*x*), the petition of the earl of *Ewe* in *France* for the caſtles of *Haſting* and *Tikebull* is anſwered, "*Quandocunque placuerit domino regi* Franciæ *terras* "*& tenementa hominibus iſtius regni reſtituere, quæ ſua fue-*"*runt, in poteſtate ipſius domini regis, quod ipſe dominus rex* "Angliæ *de caſtris & terris prædictis prædicto comiti reddendis* "*faciet, quod de conſilio ſuo viderit eſſe faciendum.*"

But ſometimes it fell out, that the inconſiderateneſs of perſons carried them upon preſumptions of ſome advantages to make a ligeance to both princes; and then the ſucceſſes of either ſide rendred them within the penalty of the breach of alligeance to the adverſe party.

Peter Brian had the earldom of *Richmond* here in *England*, and held it of the crown of *England*, and the duchy of *Britany* in *France*, which was held of the crown of *France*, (tho *Brompton* tels us, that by an agreement between *Richard* I. and the king of *France ſub anno* 1191. (*y*), the ſeigniory thereof was beſtowed upon the king of *England*) he was an homager of the crown of *France*, and upon ſome agreement between him and the king of *England* touching a war with *France*, he came into *England*, and, as it ſeems, ſwore fealty to the crown of *England*; but afterwards he fell in again with the king of *France*, and *betrayed* the army of the king of *England*, and *per internuncios reddidit* Angliæ *regi homagium*; but he loſt himſelf with both crowns: the king of *France* diſpoſed of the duchy of *Britany* to his ſon, and the king of *England* gave the earldom of *Richmond* to *Peter de Sabaudia*; tho upon an exchange he afterwards took it back, and reſtored it to a ſon of the former earl. *M. Paris ſub anno* 1234. *p.* 406.

T and

(*x*) *Ryley's Plac. Parl. p.* 20. (*y*) *Vide Brompton, p.* 1196.

and *Clauſ.* 19 *H.* 3. *m.* 17. *dorſ.* where in a letter by the king to the pope the whole ſtory is related.

After this *John de Breme* otherwiſe *Montford* deſcended from the above-mentiond *Peter*, falling in with king *Edward* III. after his aſſumption of the title of *France*, was reſtored to the duchy of *Britany* and earldom of *Richmond*; and *Clauſ.* 19 *E.* 3. *p.* 1. *m.* 14. *dorſ.* did his lige homage to king *Edward* III. as king of *France* in theſe words: "Mon ſeigneur, jeo vous recognoiſſe droiturell roy de "*France*, et a vous, come a mon ſeignior liege et droiturell "roy de *France*, face mon homage pur le dit dutchy de *Bre-* "*taigne*, quel jeo claime tener de vous, mon ſeignior, et de- "veigne voſtre home lige de vie, et de membre, et de ter- "rene honor, a vivre et morir countre touts gents." His "ſon *John de Montford* falling back to the king of *France* loſt the earldom of *Richmond* by judgment in parliament 7 *R.* 2. but enterd *de recordo. Rot. Parl.* 14 *R.* 2. *n.* 14.

Theſe difficulties befel thoſe, that were *ad fidem utriuſque regis*; they were ſure to be loſers on one ſide, and ſometimes on both ſides.

And thus far touching the oath of alligeance or fealty.

II. The ſecond expreſs obligation of the ſubject to his prince is that of homage.

This, tho it be no oath, but a very ſolemn profeſſion of duty, yet it hath always fealty performd with it, and after it; for homage draws with it fealty, which in caſe of ſimple homage done to a ſubject is with the ſame exceptions, as the homage is; but in caſe of *homagium ligeum* it hath attending upon the performance thereof *fidelitas ligea*, or alligeance.

The kinds of homage are three: 1. *Simple*, as that which is performd to a mere ſubject by virtue of his tenure. 2. *Homagium ligeum.* 3. *Homagium mixtum.*

1. The ſimple homage, which is performd barely by reaſon of tenure, is that, which *Littleton* deſcribes both in the words and ceremonies, *Lib.* II. *cap.* 1. (*z*), wherein always there is an exception of the faith due to the king.

3 2. *Ho-*

(*z*) *Sect.* 85.

2. *Homagium ligeum* which is thus: "Jeo deveigne voſtre "home de ceo jour en avant de vy et membre, et de terrene "honor, et a vous ſerra foyal et loyal, et foy a vous portera "contre touts gents, qe viure poient, ou morier"; this is the form, that *Fleta* gives *Lib.* III. *ca.* 16. (*a*)

The ceremony is the ſame, when done to the king, as when it is performd to a meſne lord, only *Rot. Parl.* 18 *H.* 6. *n.* 58. the ceremony of kiſſing the king was diſpenſed with by reaſon of the danger of contagion in time of plague.

And touching this homage theſe things are obſervable:

1. It differs from the oath of alligeance in that, this is only by a profeſſion; but alligeance is by an oath, tho the oath of alligeance alſo accompany it.

2. It differs in this, that, whereas all men above the age of twelve years are to take the oath of alligeance, whether they hold land, or not; yet lige homage is not to be performd but by three ſorts of perſons: 1. Such as hold of the king by homage, which, tho it be performd in reſpect of tenure, yet it is *homagium ligeum*, becauſe performd to the ſovereign, and without any exception of the homage due to inferior lords. 2. Such as are dukes, earls, or viſcounts, or barons, tho they hold nothing of the king, yet at the coronation they perform a lige homage; the tenor whereof runs thus: "I become your liege man of life and limb, and of "earthly worſhip, and faith and truth I ſhall bear unto you "to live and die againſt all manner of folk: *ſo God me help.*" and then he toucheth the crown, and then toucheth the ground; *nota*, it refers not to any lands. 3. By prelates, or biſhops; and this not only at the coronation of the king, but after their election, and before the reſtitution of their temporalities. *Vide Statute* 25 *H.* 8. *cap.* 20.

Antiently the clergymen quarreld at the performance of homage to the prince; but by the conſtitutions of *Clarendon* ſet down by *Matthew Paris*, *p.* 101. they were bound to perform it, and it hath been hitherto practiſed; only to gratify them in ſome thing antiently it was indulged in this manner, *viz.* "*Faciet electus homagium & fidelitatem regi, ſicut ligeo* "*domino*

(*a*) *Sect.* 21.

" *domino ſuo, de vitâ, & membris, & de honore terreno, ſalvo* " *ordine ſuo, priuſquam conſecretur*"; and, tho I do not find this *ſalvo ordine* inſerted in after-times, yet there hath been a temperament added to that homage performd by clergymen, which, it ſeems, ſatisfied their ſcruple, their homage running thus: " *I do you homage, and faith, and truth bear unto you,* " *our ſovereign lord, and to your heirs kings of* England, *and I* " *ſhall do, and truly acknowledge the ſervice of the lands, which* " *I claim to hold of you in the right of the church, as God me help.*"

And this is fealty, as well as homage, for it is accompanied with an oath, tho it hath the ſolemnity of genuflexion, and kiſſing the king's cheek.

3. The agreements and differences between that homage, that is ſimply feudal, or by reaſon of tenure only, and this homage, that is *homagium ligeum*, are theſe: 1. Becauſe, tho homage is not to be done by any, but thoſe, that hold by that ſervice, or by the nobility, or clergy, as before; yet when done to the king, it becomes *homagium ligeum* in reſpect of the perſon to whom it is performd. 2. If it be homage done to the king, it is *homagium ligeum*, and hath no exception of homage due to others. 3. But principally the difference is in the effect of it, which is excellently deſcribed by *Terrien* in his Comment upon the *Cuſtumer of Normandy*, *Lib.* III. *cap.* 1. Feudal homage, that is ſimply ſuch, binds only *ratione feodi*; therefore if the homager alien, or deliver to his lord his fief, or fee, he is diſcharged of the obligation; but lige homage, tho it may be performd by reaſon of the fee in its kind or ſpecies, yet it principally binds the perſon; and tho the fief it ſelf be aliened, or transferd to another, yet the obligation of lige homage continues.

3. There are certain homages, that are mixt, and partly lige, and partly not; and they are of two kinds: 1. When the homage is performd to a prince, that is ſovereign in relation to his ſubjects, yet owes a ſubjection to ſome other prince; this was the caſe of the prince of *Wales*, and the king of *Scots* before mentioned, the homage, that they performd to the king of *England*, was ſimply lige homage, as we may read before and particularly in *Walſingham*'s *Ypodigma Neuſtriæ*

ſub anno 1291. (*b*), where the tenor of the homage of *John de Baliol* king of *Scots* is entred *in hæc verba*: "*Domine* Edvarde *rex* Angliæ, *ſuperior domine regni* Scotiæ, *ego* Johannes Baliol *rex* Scotiæ *recognoſco me hominem veſtrum ligeum de toto regno* Scotiæ, *& omnibus pertinentiis, & hiis, quæ ad hoc ſpectant; quod regnum meum teneo & de jure debeo & clamito tenere hæreditariè de vobis & hæredibus veſtris regibus* Angliæ, *de vitâ & de membris, & de terreno honore contra omnes homines, qui poſſunt vivere & mori.*"

I mention this homage of the king of *Scots*, not to revive the antient controverſy touching the ſubordination of that kingdom to this, for that difference hath been long ſettled and at peace; but only to apply my inſtances of the various ſorts of homages performd by ſovereign princes.

But the homage, that was performd by their ſubjects to them, was partly lige homage, and partly not; it was lige homage as to between the king of *Scots* and them, and as to all perſons in the world, except the king of *England*; for the king of *Scots* and prince of *Wales* had the rights of ſovereignty *jura imperii* as in relation to their ſubjects and all others, but the king of *England*.

But in relation to the king of *England*, the homage performd to the prince of *Wales*, or king of *Scots* was not lige homage; for there was an exception either expreſſed or implied at leaſt *ſalvâ fide domini regis Angliæ*, as appears plainly above.

2. Another inſtance of a mixt homage is, when a ſovereign prince hath a vaſſalage, or poſſeſſion in another abſolute prince's dominion: this was the caſe of the king of *England*, in relation to the lordſhips and ſeignory he had in *France*, as *Aquitaine*, *Anjou*, and *Picardy*, *&c.* which were all held of the crown of *France*: theſe deſcended to king *Edward* III. the king of *France* required lige homage from the king of *England* for theſe territories; the king of *England*, as king of *England*, had no dependence on *France*, and therefore for the more caution performd to the king of *France* for the dutchy of *Aquitaine* and other his poſſeſſions in *France* a general homage

(*b*) *&* 1291. *p.* 477, 479, 480.

mage by theſe words, " *Nous entromys in l'homage de roy de* " France *per ainſi, come nous et nous predeceſſors dues de* Guyen " *eſtoient jades entrerent en l'homage des roys de* France *pur temps* " *eſteant*"; and altho afterwards a ſettled form of homage was preſcribed in this caſe (*c*), yet moſt evident it is, that it was not *homagium ligeum*, but only a *feudal homage* relative to thoſe territories of the crown of *France*, but not at all with any relation to the perſon or crown of the king of *England*.

For the king of *England* had a double capacity, one as an abſolute prince, that owed no ſubjection to the crown of *France*, nor to any other king, or ſtate in the world; in this capacity he neither did nor could do homage to the king of *France*; he had another capacity, as duke of *Aquitaine*, and in that capacity he owed a *feudal*, but not *perſonal* ſubjection to the crown of *France*; and in this latter capacity only, and as a different perſon from himſelf, as king of *England*, he did the homage, which was in truth no *lige homage*, but a bare *feudal homage*, which I rather mention to rectify the miſtakes of thoſe, that call it a lige homage.

But by the way I muſt obſerve, this feudal homage, as duke of *Aquitain*, laſted not long, for in 14 E. 3. the king of *England* aſſumed the title of king of *France* together with the arms of *France* by hereditary deſcent, which ſtyle his ſucceſſors have ever ſince uſed.

And indeed the name of lige homage from him, that was king of *England*, to the king of *France*, tho purely in the capacity of duke of *Aquitain*, ſounded ſo ill, that when a peace was in treaty between the king of *France* and *Richard* II. *viz. Rot. Parl.* 17 *R.* 2. *n.* 16. the entry is made, " *Fait a re-* " *member qe le roy, ſeigneurs, chivalers, et juſtices aſſenterent en ceſt* " *parliament a le pees, purenſi qe noſtre dit ſeigneur le roy ne* " *face homage lige, et ſauant touts dits le liberty de la perſon* " *noſtre ſeigneur le roy, et de ſon royalme de Angleterre et de ſes* " *liges du dit royalme*", and with power to return to the title of the crown of *France*, in caſe of breach of league by the king of *France*: this is farther amplified by the ſpeech made openly by the ſpeaker of the houſe of commons. *Ibid. n.* 17.

The

(*c*) *Vide Pat.* 5 *E.* 3. *part.* 1. *m.* 17.

4

The homage here meant was with relation to the duchy of *Aquitain*, which upon this treaty was to be deliverd to the king of *England*.

And thus much touching theſe two ſecurities of the ſubject's alligeance to the king of *England*, wherein I have been the larger, becauſe many things occur in this buſineſs, that give ſome light to antiquity, and do not ſo commonly occur, and becauſe the great brand of high treaſon is, that it is a violation or breach of that ſacred bond from the ſubject to his king, commonly called alligeance, for the ſecurity whereof this oath of alligeance, and lige homage were inſtituted, and effectually expounds the obligation, and duty of that alligeance, that is due from the ſubject to the king.

I ſhall now only mention thoſe two eminent oaths of ſupremacy, and obedience, tho there were beſides them other temporary oaths relating to the crown, as that of 25 *H.* 8. *cap.* 22. 26 *H.* 8. *cap.* 2. 28 *H.* 8. *cap.* 7. 35 *H.* 8. *cap.* 1.

The ſupremacy of the crown of *England* in matters eccleſiaſtical is a moſt unqueſtionable right of the crown of *England*, as might be ſhewn by records of unqueſtionable truth and authority, but this is not the buſineſs of this place; yet nevertheleſs the pope made great uſurpations and incroachments upon the right of the crown herein.

King *Henry* VIII. in the twenty-fifth year of his reign having pared off thoſe incroachments in a good meaſure by the ſtatute of 25 *H.* 8. *capp.* 19, 20, 21. in the twenty-ſixth year of his reign the ſupremacy in matters eccleſiaſtical is rejoind and reſtored to the crown by the ſtatute of 26 *H.* 8. *cap.* 1.

The papal incroachments upon the king's ſovereignty in cauſes and over perſons eccleſiaſtical, yea even in matters civil under that looſe pretenſe of *in ordine ad ſpiritualia*, had obtaind a great ſtrength, and long continuance, notwithſtanding the ſecurity the crown had by the oaths of ſealty and alligeance; ſo that there was a neceſſity to unrivet thoſe uſurpations by ſubſtituting by authority of parliament a recognition by oath of the king's ſupremacy as well in cauſes eccleſiaſtical, as civil.

And

And therefore after thoſe revolutions, that happend in the life, and on the death of *Henry* VIII. *Edward* VI. and queen *Mary*, queen *Elizabeth* coming to the crown, the oath of ſupremacy was enacted by the ſtatute of 1 *Eliz. cap.* 1. for the better ſecuring of the ſupreme authority of the crown of *England* as well in matters eccleſiaſtical, as temporal; which I ſhall not here repeat, but reſerve the ſame, and what is proper to be ſaid touching it, to a particular chapter hereafter. (*d*)

Afterwards the dangerous practices of popiſh recuſants gave the occaſions of enacting of the oath of obedience by the ſtatute of 3 *Jac. cap.* 4. which I ſhall likewiſe refer to its proper place.

And thus far touching alligeance, and the ſecurities of the ſame by the oath of alligeance, and the profeſſion of lige homage.

CHAP. XI.

Concerning treaſons *at the Common law, and their uncertainty.*

HAving ſhewn in the former chapter the kinds and bonds of fidelity and alligeance from the ſubject to the king, I come to conſider of thoſe crimes, that in a ſpecial manner and ſignally violate that alligeance, namely high treaſon.

At Common law the crime of high treaſon had ſome kinds of limits and bounds to it.

(*d*) *Vide poſtea cap.* 25.

In the time of *Henry* II. *Glanvil*, who then wrote, *Lib.* IV. *cap.* 1 & 7. tells us of four kinds of *crimina læſa majeſtatis*, *viz. de morte regis*, *de ſeditione regni*, *de ſeditione exercitûs regis*, and the counterfeiting of the great ſeal; for as to the counterfeiting of money, that came under the title of *Crimen falſi*, and the puniſhment thereof antiently was various; but of that particular hereafter.

Bracton, that wrote in the time of *Henry* III. *Lib.* III. *cap.* 3. "*Siquis auſu temerario machinatus ſit in mortem domini* "*regis*; *vel aliquid egerit*, *vel agi procuraverit ad ſeditionem* (*a*) "*domini regis*, *vel exercitûs ſui*; *vel procurantibus auxilium &* "*conſilium præbuerit*, *vel conſenſum*, *licet id*, *quod in voluntate* "*habuerit*, *non perduxerit ad effectum*"; to which he adds counterfeiting of the ſeal and money; which, tho they come under *crimen falſi*, yet are reckond by him among the *crimina læſa majeſtatis*: tho in theſe old authors treaſon is ſometimes expreſſed by the name of *ſedition*, yet that word is too general and comprehenſive of other offenſes not capital, as well as of treaſon; and therefore a charge of ſedition againſt the king, or of exciting ſedition, or of ſpeaking, writing, or doing any thing *ſeditiouſly*, doth not amount to a charge of treaſon; and therefore it was, that in the caſe of *Selden* and others, *Trin.* 5 *Car. B. R.* (*b*), when upon an *habeas corpus* the parties were returned *committed by the privy council by the king's*

X *command*

(*a*) In the caſe of Mr. *Selden* this is ſuppoſed to be the true reading, but in moſt of the *MSS.* of *Bracton* the word in this place is *ſeductionem*, altho in other places of the ſame chapter the word *ſeditio* is uſed: *Fleta* makes frequent uſe of the word *Seductio*, *Lib.* I. *cap.* 30. §. 1. *cap.* 21. §§. 1, 2, 3. (the laſt of which places ſeems to be a direct tranſcript from *Bracton*) tho the word *ſeditio* is once uſed by him, *dicto capitulo*, §. 8. and *Bracton* afterwards in this ſame chapter ſtyles a traitor *ſeductor*.

Hengham cap. 2. and *Glanvil*, *Lib.* I. *cap.* 2. both of them place *ſeditiones* in the rank of treaſons, and ſo it was eſteemed by the Civil law. *Dig. Lib.* XLVIII. *tit.* 4. *ad leg. Jul. Majeſtatis*, *l.* 1. *tit.* 19. *De pœnis*, *l.* 38. §. 2. *Seditio* continued to be the technical word in legal proceedings (as will appear from ſeveral records hereafter quoted) until the terms *proditio & proditorè* prevaild in its room, which laſt word muſt now be neceſſarily uſed in every indictment of treaſon. 3 *Co. Inſt.* 4, 12, 15.

(*b*) *Mich.* 5 *Car.* I. *Vide Rushworth's Hiſtorical Collections*, *Vol.* I. *p.* 679. *Appendix p.* 18, *&c. Seldeni Opera*, *Vol.* VI. *p.* 1938. The court was content, that they ſhould be bailed, but ſaid, that they ought to find ſureties alſo for their good behaviour: they had their ſureties ready for the bail, but they were remanded to the *Tower*, becauſe they would not find ſureties for the good behaviour. *Selden* was not bailed till *May* 1631. and not diſcharged from his bail till *January* 1634. *Vindiciæ Maris Clauſi*. *Seldeni Opera*, *Vol.* IV. *p.* 1421, *&c.*

command for stirring up sedition against the king, the prisoners were bailed in the king's court, because it amounted not to to a charge of treason, for sedition in a true legal signification doth not import treason.

Fleta, who wrote in the time of *Edward* I. agrees almost *verbatim* with *Bracton*, *viz. Lib.* I. *cap.* 20, 21. (c)

Britton, who made his book in the time also of king *Edward* I. reckons up treasons much in the same manner, yet makes some additions, *cap.* 8. *de treson*; "*Grand treson est* "*a compasser nostre mort, ou disheriter nous de nostre royalme,* "*ou de fauser nostre seal, ou de countrefaire nostre monoye, ou* "*de le retoundre.*"

And *cap.* 22. *de appeles*: "*Sont ascunes felonies, que touchent* "*nostre sieyt, et poient estre suys pur nous, sicome de vers nos* "*mortels enemies, de nostre seal, de nostre corone, et de nostre* "*monoye fause.*"

Again; "*En primes, c'est a dire, de appels de felonies, que* "*poient estre faitz par nous, et nemye pour nous, sicome de tre-* "*son, et de compassement purveu vers nostre persone pour nous* "*mettre a mort, ou nostre compayne, ou nostre pere, ou nostre* "*mere, ou nos enfauntz, ou nous disheriter de nostre royalme,* "*ou de trahir nostre hoste, tout ne soit tiel compassement mys* "*en effett.*"

And in the later end of the same chapter, "*Et de* "*fausyn de nostre seal, & de nostre monoye, purra lensuer ap-* "*pels pour nous en meisme la manere, et ausi del purgiser de no-* "*stre compayne, ou de nos filles, ou des norices de nos enfauntz:* "*(d) En queux cases soit le jugement, de estre treyne, et pen-* "*du,*

(c) He does not rank the counterfeiting of the seal or of the coin among the *crimina læsæ majestatis*, (as *Bracton* does) but among the *crimina falsi*, *Lib.* I. *cap.* 22.

(d) According to the *Mirror of Justices*, *p.* 21, 22. high treason is committed, 1. *Per ceux, que occident le roy, ou compassent de faire.* 2. *Per ceux, que luy disheritent del royalme, per* [*ceux que*] *trahissent un host, ou compassent de le faire.* 3. *Per ceux averterori, que spargissent le femme le roy, le file le roy engenesse legitime, avent ceo que elle soit mary, en la garde le roy, ou la nurice le aut le heire le roy.*——These are the only offences, which that treatise calls *Crimes de Majesty*. Counterfeiting of the king's seal or money is ranked under *Faussonnery*, *p.* 29. And every species of petit treason is styled *Treason*, *p.* 30. as it is also by *Briton*, *cap.* 8.

It is one of the articles against *Roger Mortimer*, *Rot. Parl.* 4 *E.* 3. *n.* 1. 28 *E.* 3. *n.* 8. that he compassed to destroy *les nurrie le roy*. If a private lord was injured

" *du, &c.*" By theſe various expreſſions of *Briton* it appears, that the crime of high treaſon was very uncertain; ſometimes ſtyled under the name of felony, ſometimes had the puniſhment of petit treaſon applied to the crime of high treaſon, and ſome crimes mentiond, as treaſons, which were not ſo taken by *Bracton*, or *Fleta*; and indeed in the farther purſuit of this argument we ſhall find, that at common law there was a great latitude uſed in raiſing of offenſes into the crime and puniſhment of treaſon, by way of interpretation and arbitrary conſtruction, which brought in great inconvenience and uncertainty.

In the parliament of 33 E. 1. now printed (*e*), which is likewiſe entred *P.* 33 *E.* 1. *Rot.* 22. *North't. coram rege*: " *Nicholaus de Segrave* was impeached (*f*) *de eo, quod cum dominus* " *rex nunc in ultimâ guerrâ ſuâ* Scotiæ *inter hoſtes & inimicos* " *ſuos extitiſſet, & idem* Nicholaus de Segrave *homo ligeus te-* " *nens de ipſo domino rege per homagium & fidelitatem in eadem* " *guerra in exercitu & auxilio ipſius commorans eſſet; idem* " Nicholaus de Segrave *motu proprio, malitioſe, & abſque cauſâ* " *contentionem & diſcordiam verſus* Johannem de Crumbwell *in* " *eodem exercitu ſimiliter in auxilium regis exiſtentem movebat,*" laying great iniquities to his charge; that *Crumbwell* offered to defend himſelf againſt theſe imputations, as the king's court ſhould award: *Et ad hoc fidem ſuam ei dedit; et poſt ejuſdem fidei dationem prædictus* Nicholaus *elongando ſe & ſuos, & extrahendo prædictum* Johannem *& ſuos ab exercitu & auxilio ipſius domini regis, quantum in ipſo* Nicholao *fuit, eundem dominum regem inter inimicos ſuos periculo hoſtium ſuorum relinquendo ſprevit, & prædictum* Johannem *ad ſe defendendum in curia regis* Franciæ *adjornavit, & certum diem ei dedit; et ſic, quantum in eo fuit, ſubmittens & ſubjiciens dominium regis & regni* Angliæ *ſubjectioni domini regis* Franciæ; and that in purſuance thereof contrary to the king's prohibition he took his journey towards

injured in this manner, it was antiently petit treaſon: " *Traditores autem, qui* " *dominum, dominamve interfecerint, vel* " *qui cum uxoribus dominorum ſuorum,* " *vel filiabus, vel nutricibus dominorum* " *concubuerint*", *&c. Fleta, Lib.* 1. *cap.* 37. §. 4. " *Ou diſparage ma file, ou ma* " *chamber, ou ma femme, ou la norrice* " *de mon haire, ou le eunt, &c.*" *Mirror de Juſtice, p.* 31. *Vide Briton, cap.* 22. (70.)

(*e*) *In Ryley's Placita Parliamentaria, p.* 266.

(*f*) *Per Nicholaum de Warewick, qui ſequitur pro domino rege.*

towards *France*; and that he did this "*nequiter & malitioſe* "*in perſonæ domini regis periculum, curiæ ſuæ contemptum, co-* "*ronæ & dignitatis ſuæ regiæ læſionem & exhæredationem ma-* "*nifeſtam, & contra ligeantiam, homagium, juramentum, & fi-* "*delitatem, quibus ipſe domino regi tenebatur.*" *Segrave* confeſſed the offenſe. The lords in parliament are charged by the king upon their alligeance to give advice, what puniſhment was to be inflicted; "*Qui omnes habito ſuper hoc dili-* "*genti tractatu & adviſamento, conſideratis & intellectis omni-* "*bus in dicto facto contentis & per prædictum* Nicholaum *plene* "*& expreſſe cognitis, dicunt, quod crimen hujuſmodi meretur* "*pœnam amiſſionis vitæ, &c.*" but he was after pardoned.

Which judgment ſeems to import no leſs, than the crime of high treaſon, tho the whole judgment be not declared at large but with an *&c.*

Accroaching of royal power was a uſual charge of high treaſon antiently, tho a very uncertain charge, that no man could well tell, what it was, nor what defenſe to make to it.

The great charge againſt the *Spencers* about the 1 *E.* 2. was, that they did accroach royal power, whereof ſeveral inſtances are given. (*g*)

The great charge againſt *Roger Mortimer* in the parliament of 4 *E.* 3. next to that of the procurement of king *Edward* II.'s death, was accroaching of royal power, whereof ſeveral inſtances are given; but he had judgment by the lords in parliament to be drawn and hanged, upon that article only, that concerned the death of king *Edward* II. *Vide infra cap.* 14.

Trin. 21 *E.* 3. *Rot.* 23. *rex coram rege. John Gerberge*, Knt. indicted, "*Quod ipſe ſimul cum aliis in campo villæ de* Royſton "*in altâ regiâ ſtratâ*", rode armed with his ſword drawn in his hand *modo guerrino*, and aſſaulted and took *William de Botelisford*, and detained him, till he paid 90 *l. &c.* and took away his horſe, "*uſurpando ſibi infra regnum regis regiam po-* "*teſtatem ipſo domino rege in partibus exteris exiſtente, contra* "*ſui ligeantiam, & regis & coronæ ſuæ præjudicium, & ſedi-*

2 "*tionem*

(*g*) *Vide Knighton, p.* 2545, 2547. *Edit. Twyſden.*

" *tionem manifeſtam*": he prayed his clergy, but was ouſted of it, *Quia privilegium clericale in hujuſmodi caſu ſeditionis ſecundum legem & conſuetudinem regni hactenus obtentas & uſitatas non eſt allocandum* (*b*): but yet he refuſing to plead was not convicted, as in caſe of treaſon, but was put to penance *ad pœnitentiam ſuam*; two of his companions being convicted by verdict, had judgment, *quod diſtrahantur & ſuſpendantur.*

This judgment it ſeems troubled the commons in parliament, who thought, that the accroaching of royal power was ſomewhat too general a charge of treaſon before the ordinary courts of juſtice, tho it had been uſed in charges of treaſon in parliament; and therefore in the parliament following held *Craſtino Hilarii* 21 *E.* 3. *n.* 15. there is a petition in parliament in theſe words: *Item prie le commen, qe come aſcuns des juſtices en place devant eux ore de novel ont adjudges pur treaſon accrochment de royal poer, pry le dit commen, que le point ſoit deſclare en ceo parlement, en quele caſe ils accrochent royal poer, per quei les ſeigneurs perdent lour profit de le forfeiture de lour tenents, et les arreynes benefice de ſeint egliſe.*

Ro'. En les caſe, ou tiel judgments ſont rendus, ſont les points des tieux treaſons et accrochments declares per meſmes les judgements.

In 22 *Aſſ.* 49. (*i*), it appears, that *John* at *Hill* was indicted, and attaint of high treaſon for the death of *Adam de Walton nuntii domini regis miſſi in mandatum ejus exequendum.*

And in the year before, *viz.* 21 *E.* 3. 23. it ſeems admitted, that an appeal of treaſon lies for the killing one of malice prepenſe, that was ſent in aid of the king in his wars with certain men of arms.

King *Edward* II. being depoſed, and committed priſoner to *Barclay* caſtle, under the cuſtody of *John Matravers* and *Thomas Gurney*, was there by the procurement of *Roger Mortimer* barbarouſly murderd; for which *Mortimer* and *Gurney* were attainted of treaſon by judgment of the lords in parliament. 4 *E.* 3. *n.* 1, 5. (*k*)

(*b*) For the ſame reaſon clergy was refuſed in *Thorpe*'s caſe, *T.* 21 *E.* 3. *Rot.* 23. *Rex. de quo vide poſtea.*

(*i*) *B. Treaſon* 14.

(*k*) *Vide Rot. Parl.* 18 *E.* 3. *n.* 8. when the judgment againſt *Mortimer* was reverſed.

Matravers was suspected to be guilty, but yet he played another game, for tho he knew of the death of *Edward* II. yet he informed *Edmund* earl of *Kent*, half-brother to *Edward* II. that he was living; the earl therefore with many others raised a force for his deliverance, but prevailed not, but was for that fact attainted of treason, *anno* 3 *E.* 3. which attainder was afterwards in the parliament 28 *E.* 3. reversed, and the grand-child of the earl of *Kent* restored (*l*): *John Matravers*, who it seems had animated the insurrection of the earl of *Kent*, tho he fled into *Germany*, yet by judgment of the lords in parliament 4 *E.* 3. *n.* 3. was attainted of treason for the death of the earl of *Kent*: the words of the record are, "*Tres-touts les peres, counts, et barons assembles a ceste parlement a* Westminster *si ont examine estraitment, et sur ce sont assentus et accordes, qe* John Matravers *si est culpable de la mort* Esmon *count de* Kent *le uncle nostre seignour le roy qe ore est, come celui qe principalment, traiterousment et fauſment la mort le dit counte compassa issint, qe la ou le dit* John *savoit la mort le roy* Edward, *ne par quant le dit* John *par enginous manner et par ſes fauſſes et mauveyſe ſubtilities fiſt le dit counte intendre la vye le roy, le quel fauſſe compaſſement fuſt cauſe de la mort le dit counte et de tout le mal qe ſ'enſuiſt, par quoi les ſus-dits peres de la tre et jugges du parlement adjuggent et agardent, qe le dit* John *ſoit treine, pendus, et decolle, come treitre, quen part, qil ſoit eſtre trouie.*"

Upon this judgment *Matravers* brought a petition of reverſal. *Rot. Parl.* 21 *E.* 3. *n.* 65. *dorſ.* but nothing was done upon it; but *Rot. Parl.* 25 *E.* 3. *p.* 2. *n.* 54, 55. he was reſtored by act of parliament.

By theſe, and the like inſtances, that might be given, it appears, how uncertain and arbitrary the crime of treaſon was before the ſtatute of 25 *E.* 3. whereby it came to paſs, that almoſt every offenſe, that was, or ſeemd to be a breach of the faith and alligeance due to the king, was by conſtruction and conſequence and interpretation raiſed into the offenſe of high treaſon. And

(*l*) That attainder was reverſed long before, *viz.* 4 *E.* 3. *Vide Rot. Parl.* 4 *E.* 3. *n.* 11, 12. upon the petition of *Edmund* his eldeſt ſon, and *Margaret* counteſs dowager of *Kent*; and *Edmund* the ſon was reſtored.

And we need no greater inſtance of this multiplication of conſtructive treaſons, than the troubleſome reign of king *Richard* II. which, tho it were after the limitation of treaſons by the ſtatute of 25 *E.* 3. yet things were ſo carried by factions and parties in this king's reign, that this ſtatute was little obſerved; but as this, or the other party prevailed, ſo the crimes of high treaſon were in a manner arbitrarily impoſed and adjudged to the diſadvantage of that party, that was intended to be ſuppreſſed; ſo that *de facto* that king's reign gives us as various inſtances of theſe arbitrary determinations of treaſons, and the great inconveniences that aroſe thereby, as if indeed the ſtatute of 25 *E.* 3. had not been made or in force. And tho moſt of thoſe judgments and declarations were made in parliament (*); ſometimes by the king, lords, and commons; ſometimes by the lords, and afterwards affirmed and enacted, as laws; ſometimes by a plenipotentiary power committed by acts of parliament to particular lords and others, yet the inconvenience, that grew thereby, and the great uncertainty, that happend from the ſame, was exceedingly pernicious to the king and his kingdom.

I ſhall give but ſome inſtances. *Rot. Parl.* 3. *R.* 2. *n.* 18. *John Imperial*, a public miniſter, came into the kingdom by the ſafe conduct of the king, and he was here murdered (*m*); and an indictment taken by the coroner upon the view of his body, "*Quel caſe examine et diſpute entre les ſeigneurs et com-*
"*mons, et puis monſtre au roy en plein parlement, eſtoit illoques*
"*devant noſtre dit ſeigneur le roy declare, determine, et aſſen-*
"*tus, qe tiel fait et coupe eſt treaſon, et crime de royal majeſty*
"*blemy, en quel caſe y ne doet allouer a nulli de enjoyer privilege*
"*de clergy.*" (*n*)

This declaration, it is true, was made and grafted upon the clauſe in the latter end of the ſtatute of 25 *E.* 3. touching declaring of treaſons by parliament.

In the parliament of 10 *R.* 2. there was a large commiſſion (*o*) granted by the king upon the importunity of certain

(*) This was the reaſon why the ſtatute of 25 *E.* 3. was not followed, becauſe that ſtatute was not thought to limit declarations in parliament.

(*m*) *Holin. Chron. p.* 422. 60. *b.*

(*n*) See 3 *Co. Inſtit.* 8.

(*o*) See this commiſſion to *R.* 2. *cap.* 2. and *State Trials, Vol.* I. *p.* 3.

great lords, and of the commons in parliament, to the archbiſhop of *Canterbury* and others for the reformation of many things ſuppoſed to be amiſs in the government; which commiſſion was thought to be prejudicial to the king's prerogative. *Vide Rot. Parl.* 10 *R.* 2. *n.* 34. *Rot. Parl.* 21 *R.* 2. *n.* 11.

After this, *viz.* 25 *Aug.* 11 *R.* 2. the king called together the two chief juſtices, and divers others of the judges, and propounded divers queſtions touching the proceeding in that parliament, and the obtaining of that commiſſion; and they gave many liberal anſwers, and among the reſt, "*Qualem pœnam merentur, qui compulerunt ſive arctârunt regem ad conſentiendum confectioni dictorum ſtatuti, ordinationis, & commiſſionis? Ad quam quæſtionem unanimiter reſponderunt, quod ſunt, ut proditores, merito puniendi: Item qualiter ſunt illi puniendi, qui impediverunt regem, quo minus poterat exercere, quæ ad regalia & prærogativam ſuam pertinuerunt? Unanimiter etiam reſponderunt, quod ſunt, ut proditores, etiam puniendi*", with divers other queſtions, and anſwers to the like purpoſe. (*p*)

This extravagant, as well as extrajudicial declaration of treaſon by theſe judges, gave preſently an univerſal offenſe to the kingdom; for preſently it bred a great inſecurity to all perſons, and the next parliament *craſtino purificationis* 11 *R.* 2. there were divers appeals of treaſons by certain lords appellors, wherein many were convict of high treaſon under general words of *accroaching royal power, ſubverting the realm, &c.* and among the reſt thoſe very judges, that had thus liberally and arbitrarily expounded treaſon in anſwer to the king's queſtions, were for that very cauſe adjudged guilty of high treaſon, and had judgment to be hanged, drawn, and quartered, tho the execution was ſpared (*q*); and they having led the way by an arbitrary conſtruction of treaſon not within the ſtatute, they fell under the ſame fate by the like arbitrary conſtruction of the crime of treaſon.

Neither

(*p*) See the queſtions and anſwers. *State Trials*, *Vol.* I. *p.* 8.

(*q*) They were all baniſhed to *Ireland* except *Treſilian*, who was executed according to the judgment. See *State Trials*, *Vol.* I. *p.* 13, 14.

Neither did it reſt here, for the tide turned, and in *Rot. Parl.* 21 *R.* 2. *n.* 12, 13. the commiſſion before-mentioned, and the whole parliament of 11 *R.* 2. is repeald, and a new appeal of treaſon againſt the duke of *Glouceſter*, earl of *Arundel*, and the commiſſioners in the former commiſſion, and the procurers thereof under that common ſtyle of *accroaching royal power*, whereupon divers of them were condemned, as traitors: and *n.* 18. there were four points of treaſon farther declared, *viz.* "*Cheſcun qe compaſſe, et purpoſe la mort le* "*roy, ou de lui depoſer, ou de ſuſrendre ſon homage liege, ou* "*celuy, qe levy le people, et chivache encountre le roy a faire* "*guerre deins ſon realme, et de ceo ſoit dument attaint, et ad-* "*jugge en parlement, ſoit adjuggez come traytor de haut trea-* "*ſon encountre la corone, et forfeit de lui, et de ſes heyres,* "*qecunques touts ſes terres, tenements, te poſſeſſions, et libertys, et* "*touts autres inheritements, qeux il ad, ou aſcun autre a ſon* "*oeps, ou avoit le jour de treaſon perpetres, ſi bien en fee tayl,* "*come de fee ſimple, au roy.*

Theſe four points of treaſon ſeem to be included within the ſtatute of 25 *E.* 3. as to the matter of them, as ſhall be hereafter ſhewed; but with theſe differences, *viz.* 1. the forfeiture is extended farther than it was formerly, namely to the forfeiture of eſtates-tail and uſes. 2. Whereas the antient way of proceeding againſt commoners was by indictment, and trial thereupon by the country, the trial and judgment is here appointed to be in parliament. 3. But that, wherein the principal inconvenience of this act lay, was this, that whereas the ſtatute of 25 *E.* 3. required an overt-act to be laid in the indictment, and proved in evidence, this act hath no ſuch proviſion, which left a great latitude, and uncertainty in point of treaſon, and without any open evidence, that could fall under human cognizance, ſubjected men to the great puniſhment of treaſon for their very thoughts, which without an overt-act to manifeſt them are not triable but by God alone.

Theſe were the unhappy effects of the breaking of this great boundary of treaſon, and letting in of conſtructive treaſons, which by various viciſſitudes and revolutions miſchieved

all parties firſt or laſt, and left a great unquietneſs, and unſettledneſs in the minds of people, and was one of the occaſions of the unhappineſs of that king.

Henry IV. uſurping the crown, and the people being ſufficiently ſenſible of the great miſchiefs, they were brought in by theſe conſtructive treaſons, and the great inſecurity thereby. *Rot. Parl.* 1 *H.* 4. *n.* 70. the parliament of 21 *R.* 2. is entirely repealed, that of 11 *R.* 2. entirely revived; and it was enacted (*r*), that a parliamentary authority be not for the future lodged in a committee of particular perſons, as it was done 21 *R.* 2. "*Et auxint meſme noſtre ſeignour le roy de* "*ſon propre motif reherceant, qe come in le dit parlement tenuz* "*l'an* 21. *y fuerent ordeymes per eſtatute pluſeurs paines de trea-* "*ſon, ſi qe y ne avoit aſcun home, qe ſauoit, come il ſe deuſt ſa-* "*voir, de faire, parler, ou dire pur doubt des vielx paines, diſt,* "*qe ſa volunte eſt tout outrement, qe en nul temps avomer aſcun* "*trayſon ſoit adjugges autrement qil ne feuſt ordeignez par ſta-* "*tute en temps de ſon nobleaiel le roy* E. *le* 3. *qe dieu aſſoyl;* "*dont les diſs ſeigneurs et comens fuerent tres grandment* "*rejoyces, et mult humblement ens remercierent noſtre dit ſeig-* "*neur le roy.*" (*ſ*)

Now altho the crime of high treaſon is the greateſt crime againſt faith, duty, and human ſociety, and brings with it the greateſt and moſt fatal dangers to the government, peace, and happineſs of a kingdom, or ſtate, and therefore is deſervedly branded with the higheſt ignominy, and ſubjected to the greateſt penalties, that the law can inflict; yet by theſe inſtances, and more of this kind, that might be given, it appears, 1. How neceſſary it was, that there ſhould be ſome fixed and ſettled boundary for this great crime of treaſon, and of what great importance the ſtatute of 25 *E.* 3. was, in order to that end. 2. How dangerous it is to depart from the letter of that ſtatute, and to multiply and inhanſe crimes into treaſon by ambiguous and general words, as *accroaching of royal power*, *ſubverting of fundamental laws*, and the like; and 3. How dangerous it is by conſtruction and analogy to make treaſons, where the letter of the law has not done

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(*r*) See 1 *H.* 4. *cap.* 3, 4 & 5. (*ſ*) See 1 *H.* 4. *cap.* 10.

done it: for ſuch a method admits of no limits or bounds, but runs as far as the wit and invention of accuſers, and the odiouſneſs and deteſtation of perſons accuſed will carry men. (*t*)

CHAP. XII.

Touching the ſtatute of 25 E. 3. *and the* high treaſons *therein declared.*

A Parliament was held on *Wedneſday* on the feaſt of St. *Hil.* 25 E. 3. at which parliament the ſtatute declaring the points of treaſon was made. The petition of the commons, upon which it was made, is *Rot. Parl.* 25 E. 3. *p.* 2. *n.* 17. in theſe words: "Item come les juſtices noſtre ſeigneur le "roy aſſignes en diverſes countees ajuggent les gents, qe ſont "empeches devant eux, come treitors par divers cauſes diſ- "conus a la comen eſtre treiſon, qe pleſe a noſtre ſeigneur "le roy par ſon counſel, & par les graunts & ſages de la "terre declarer les points de treſon en ceſt preſent parle- "ment.

"*Ro'.* Quant a la petition touchant treiſon noſtre ſeigneur "le roy ad fait declarer les articles de ycele en manner qe "enſuit: ceſt aſſavoir, en caſe quant home face compaſer "ou ymaginer la mort noſtre ſeigneur le roy, ou madame ſa "compaigne, ou de lour fitz primer & heir; ou ſi home "violaſt la compaigne le roi, & la eiſne fille le roy nient "marié, & la compaigne a leiſne fitz & heire du roi; & ſi "home leve de guerre contre noſtre ſeigneur le roy en ſon "royalme; ou ſoit adhereant as enemies noſtre ſeigneur le "roy en le royalme, doriant a eux eide, & confort en ſon "royalme ou par aillours, & de ceo provablement ſoit at- "teint

(*t*) This reaſoning of our author is equally ſtrong againſt conſtructive interpretations of *compaſſing the death of the king.*

" teint de overt fait par gents de lour condicion: Et ſi home
" contreface le grant ſeale le roy, ou ſa monoie, & ſi home
" apporte fauſſe monoie en ceſt royalme contrefait a la mo-
" noie dengleterre, ſi come la monoie appellee *Luſſeburgh*, ou
" autre ſemblable a la dite monoie dengleterre, ſachant la
" monoie eſtre fauſſe, pur marchander ou paiement faire en
" deceit noſtre ſeigneur le roy & de ſon people: Et ſi home
" tuaſt chancellor, treaſurer, ou juſtice noſtre ſeigneur le roi
" del un baunk, ou del autre, juſtice en eir, des aſſiſez &
" de touz auters juſtices aſſignez a oyer & terminer, eſteantz
" en lour places enfeſant lour oſfice. Et fait a entendre qe
" en les caſes ſuſnomees doit eſtre ajuggee treiſonce, qe eſtent
" a noſtre ſeigneur le roi & a ſa royale majeſte, & de tiels
" maneres de treiſon la forfeiture des eſcheets appertient a
" noſtre ſeigneur le roy, ſibien des terres, & tenementz tenuz
" des auters, come de lui meſme: oueſque ceo il y ad autre
" manere de treiſon, ceſt aſſavoir, quant un ſervant tue ſon
" meſtre, une feme, qe tue ſon baron, quant home ſecular
" ou de religion tue ſon prelate, a qi il doit foi & obedi-
" ence, & tiel manere de treiſon doun forfeiture des eſcheets
" a cheſcun ſeigneur de ſon fee propre; & pur ceo qe plu-
" ſours autres cas de ſemblable treiſon purront eſchaier en
" temps avenir, queux home ne purra penſer ne declarer en
" preſent, aſſentu eſt qe qui autre cas ſuppoſe treiſon, qe
" neſt eſpecifietz peramont, aviegne de novel deuant aſcuns
" juſtices, demoerge la juſtice ſanz aler a juggement de
" treiſon, tantque per devant noſtre ſeigneur le roy & ſon
" parlement ſoit le caſe monſtre, & declare, le quel ceo doit
" eſtre ajugge treſon, ou aut' felonie; & ſi par cas aſcun
" home de ceſt royalme chivache armee deſcovert, ou ſecret-
" ment ad gentz armez contre aſcun autre pur lui tuer ou
" deſrobber, ou pur lui prendre & retener tanque il face
" fyn ou raunceon pur ſa deliverance avoir, neſt pas lentent
" du roy & du ſon counſeil, qe en tiel cas ſoit ajugge trei-
" ſon, einz ſoit ajugge felonie, ou treſpaſs ſolonc la ley de la
" terre auncienement uſee, & ſolonc ceo qe le cas demand:
" Et ſi en tiel cas, ou autre ſemblable devant ces heures aſ-
" cun juſtice eit ajugge treiſon, & par ycelle cauſe les terres

" & tenementz devenuz en la maine noſtre ſeigneur le roi come
" forfaitz eient les cheifes ſeignours de fee lour eſcheats des te-
" nementz de eux tenuz, le quel qe les tenementz ſoient en la
" maine le roi ou en main dauters par illeim, ou en autre ma-
" nere: ſavant toutes foits a noſtre ſeigneur le roi lan, & le
" waſt, & auters forfeitures des chatelz, qe a lui attient en les
" cas ſuſnomez, & qe briefs de *ſcire facias* vers les terre-te-
" nants ſoient grantez en tiel cas ſanz autre original & ſanz
" alouer la protection noſtre ſeigneur le roi en la dite ſuyte;
" & de les terres, qe ſont in la maine le roi, ſoient grantes
" briefs as viſcontz des countees la, ou les terres ſerront, de
" ouſter la maine ſanz autre delaie."

The ſtatute itſelf is drawn up upon this petition and anſwer, and differs nothing in ſubſtance from the anſwer to the petition upon the parliament-roll: the ſtatute itſelf runs in theſe words; " *Item*, whereas divers opinions have been be-
" fore this time in what caſe treaſon ſhall be ſaid, and in
" what not, the king at the requeſt of the lords and of the
" commons hath made a declaration in the manner, as here-
" after followeth; that is to ſay, when a man doth compaſs
" or imagine the death of our lord the king, or our lady his
" queen, or of their eldeſt ſon and heir; or if a man do
" violate the king's companion, or the king's eldeſt daughter
" unmarried, or the wife of the king's eldeſt ſon and heir;
" or if a man do levy war againſt our lord the king in his
" realm, or be adherent to the king's enemies in his realm,
" giving to them aid and comfort in the realm or elſewhere,
" and thereof be provably (*a*) attainted of open deed by
" the people of their condition; and if a man counterfeit the
" king's great or privy ſeal, or his money; and if a man bring
" falſe money into this realm counterfeit to the money of *Eng-*
" *land*, as the money called *Luſhburgh*, or other like to the ſaid
" money of *England*, knowing the money to be falſe, to mer-
" chandize or make payment in deceit of our lord the king
" and of his people: and if a man ſlay the chancellor, treaſurer,
" or the king's juſtices of the one bench or the other, juſtices
" in eyre, or juſtices of aſſize, and all other juſtices aſſigned

(*a*) See 3 *Co. Inſtit. p.* 12.

" to hear and determine, being in their places doing their
" offices. And it is to be underſtood, that in the caſes a-
" bove rehearſed that ought to be judged treaſon, which
" extends to our lord the king and his royal majeſty, and
" of ſuch treaſon the forfeiture of the eſcheats pertaineth to
" our lord the king, as well of the lands and tenements holden
" of others, as of himſelf: and moreover there is another man-
" ner of treaſon, that is to ſay, when a ſervant ſlayeth his
" maſter, or a wife her huſband, or when a man ſecular, or
" religious, ſlayeth his prelate, to whom he oweth faith and
" obedience; and of ſuch treaſon the eſcheats ought to per-
" tain to every lord of his own fee: and becauſe that many
" other like caſes of treaſon may happen in time to come,
" which a man cannot think nor declare at this preſent time,
" it is accorded, that if any other caſe ſuppoſed treaſon,
" which is not above ſpecified, doth happen before any ju-
" ſtices, the juſtices ſhall tarry without any going to judg-
" ment of the treaſon, till the cauſe be ſhewed and de-
" clared before the king and his parliament, whether it ought
" to be judged treaſon, or other (*b*) felony: and if *par caſe*
" any man of this realm ride armed covertly, or ſecretly
" with men of arms againſt any other to ſlay him, or rob
" him, or take him, or retain him, till he hath made fine
" or ranſom for to have his deliverance, it is not the mind of
" the king, nor his council, that in ſuch caſe it ſhall be
" judged treaſon, but ſhall be judged felony, or treſpaſs ac-
" cording to the laws of the land of old time uſed, and ac-
" cording as the caſe requireth. And if in ſuch caſe, or
" other like, before this time any juſtices have judged trea-
" ſon, and for this cauſe the lands and tenements have
" come into the king's hands as forfeit, the chief lords of the
" fee ſhall have the eſcheats of the tenements holden of
" them, whether that the ſame tenements be in the king's
" hands, or in others by gift, or in other manner; ſaving
" always to our lord the king the year and the waſt,
" and the forfeitures of chattles, which pertain to him in

4 " the

(*b*) The old tranſlation ſeems here to be preferable, *viz.* *eſſe*; for *aut* being abbreviated may be either *autre* or *autrement*.

" the caſes above-named; and that writs of *ſcire facias*
" be granted in ſuch caſe againſt the land-tenants without
" other original, and without allowing any protection in the
" ſaid ſuit; and that of the lands, which be in the king's
" hands, writs be granted to the ſheriffs of the counties,
" where the lands be, to deliver them out of the king's
" hands without delay."

The ſeveral high treaſons hereby declared are theſe:

1. The compaſſing of the death of the king, queen, or prince, and declaring the ſame by an overt-act.

2. The violation or carnal knowledge of the king's conſort, the king's eldeſt daughter unmarried, or the prince's wife.

3. The levying of war againſt the king.

4. The adhering to the king's enemies within the land or without, and declaring the ſame by ſome overt-act.

5. The counterfeiting of the great ſeal or privy ſeal.

6. The counterfeiting of the king's coin, or bringing counterfeit coin into this realm.

7. The killing of the chancellor, treaſurer, juſtices of the one bench or the other, juſtices in eyre, juſtices of aſſiſe, juſtices of *oyer* and *terminer* in their places doing their offices.

CHAP. XIII.

Touching high treaſon in compaſſing the death of the king, queen or prince.

THE firſt article of high treaſon declared by the ſtatute of 25 E. 3. is this, and in theſe words:

" *When a man doth compaſs or imagine the death of our lord*
" *the king, or of our lady the queen, or of their eldeſt ſon and*
" *heir.*"

Upon

Upon this diviſion there will be theſe conſiderations.

I. What ſhall be ſaid *a man that compaſſeth.*

II. What ſhall be ſaid the *king, queen,* or *their eldeſt ſon.*

III. What ſhall be ſaid *a compaſſing* or *imagining of any of their deaths.*

IV. What ſhall be evidence, or an *overt-act* to prove ſuch imagining.

V. The form of an indictment of compaſſing the death of the king, queen, or prince.

I. What ſhall be ſaid *a man compaſſing, &c.*

The general learning of this point in relation to natural, accidental, or civil incapacities hath been at large handled in the former chapters; but there is ſomething peculiar to the caſe of high treaſon, which is conſiderable in this diviſion.

If an *alien amy* comes into *England*, and here compaſs the death of the king, queen, or prince, this is a man compaſſing within this law; for, tho he be the natural ſubject of another prince, yet during his reſidence here he owes a local alligeance to the king of *England*, and tho the indictment ſhall not ſtyle him *naturalis ſubditus*, nor ſtyle the king *naturalem dominum*, yet it ſhall run *proditorie & contra ligeantiæ ſuæ debitum. Co. P. C. p.* 5. 7 *Rep. Calvin's* caſe. (*a*). *Dyer* 144.

If an *alien amy* ſubject of another prince comes into this kingdom and here ſettles his abode, and afterwards war is proclaimd between the two kings, and yet the alien continues here and takes the benefit of the king's laws and protection, and yet compaſſes the death of the king, this is a man compaſſing within this law; for, tho he be the natural ſubject of another prince, he ſhall be dealt with as an *Engliſh* ſubject in this caſe, unleſs he firſt openly remove himſelf from the king's protection by paſſing to the other prince, or by a public renunciation of the king of *England*'s protection, which hath ſome analogy with that, which they call *diffidatio*, or defiance.

And the ſame law I take to be, if the ſubject of a forein prince in war with ours come into *England* and here trade and

(*a*) *fol.* 6, 17.

and inhabit either as a merchant, dweller, or ſojourner, if ſuch a perſon compaſs the death of the king, he may be dealt with as a traitor, becauſe he comes not hither as an enemy, or by way of hoſtility, but partakes of the king's protection: with this agrees the caſe of *Stephano Farrara de Gama*, and *Emanuel Lewes Tinoco*, *Portugueze* born, and then ſubjects to the king of *Spain*, between whom and the queen of *England* there was then open war, who were indicted and attaint of high treaſon for conſpiring with Dr. *Lopez* to poiſon the queen (*b*). 37 *Eliz. Calvin*'s caſe. 7 *Co. Rep. p.* 6.

And, tho they came hither with the queen's protection, it alters not the caſe, for every foreigner living publicly and trading here is under the king's protection: and this appears by the ſtatute of *Magna Charta*, *cap.* 30. "*Et ſi ſint de terrâ* "*contra nos guerrinâ, & tales inveniantur in terrâ noſtrâ in* "*principio guerræ, attachientur ſine damno corporum ſuorum vel* "*rerum, donec ſciatur a nobis vel a capitali juſticiario noſtro,* "*quomodo mercatores terræ noſtræ tractentur, qui tunc inveniantur* "*in terrâ illâ contra nos guerrinâ; & ſi noſtri ſalvi ſint ibi,* "*alii ſalvi ſint in terrâ noſtrâ.*"

The ſtatute ſpeaks indeed of *mercatores*, but under that name all foreigners living or trading here are compriſed.

And therefore in antient times before the ſubjects of forein princes in hoſtility reſiding here were dealt with as enemies, a proclamation iſſued for their avoidance out of the kingdom; and in default of their avoidance within the time limited by ſuch proclamation they loſt the benefit of the king's protection.

And after ſuch proclamation, yet upon caution given ſometimes by mainpriſe *de ſe bene gerendo*, ſometimes by oaths of fidelity to the king, they had ſometimes ſpecial, and oftentimes general protections, notwithſtanding ſuch hoſtility. *Rot. Vaſcon.* 18 *E.* 2. 21, 24. *Pat.* 14 *H.* 6. *part.* 2. *m.* 34, 35.

The ſtatute of the *Staple* (*c*), *cap.* 17. hath made proviſion for merchants ſtrangers, in caſe war ſhall happen between their prince and the king of *England*, *viz.* that they ſhall have convenient warning by forty days by proclamation

(*b*) *Vide Camdeni Eliz. ſub anno* 1594. (*c*) 27 *E.* 3.

to avoid the realm; and if they cannot do it by that time by reaſon of ſome accident, they ſhall have forty days more, and in the mean time liberty to ſell their merchandizes: during theſe eighty days they have the king's protection, and if they do any treaſonable act above-mentioned, they ſhall be indicted of treaſon, notwithſtanding the hoſtility between their ſovereign and the king of *England*; but it ſeems, that if he remain here in a way of trade after proclamation ſo made, and the time of his demurrage allowed by this act, he may be dealt with as an alien enemy; but yet if he after that time continues in his way of trade or living as before, and ſhall then conſpire the king's death, *&c.* the king may deal with him as an alien enemy by the law of nations, or as a traitor by the law of the land; becauſe *de facto* he continues as a ſubject, and under the benefit *de facto* of the king's protection.

Therefore the general words in *Co. P. C. p.* 5. wherein he ſuppoſeth an alien enemy cannot be guilty of treaſon, but muſt be dealt with by martial law, are to be taken with that allay, that is given in *Calvin*'s caſe, *fol.* 6. *b.* in theſe words: "*But if an alien enemy come to invade this realm, and be taken* "*in war, he cannot be indicted of treaſon, for the indictment* "*cannot conclude* contra ligeantiæ ſuæ debitum": the like may be ſaid of ſuch as are ſent over merely as ſpies by a forein prince in hoſtility; but an alien enemy living here in the condition of an inhabitant or trader may be guilty of treaſon as well as an alien *amy*, for he doth it *proditorie* and treacherouſly, and againſt the obligation that lies upon him, as well as any others, to be true to the prince, the benefit of whoſe laws and protection he holds, ſo long as he is under the ſame.

But yet this is obſervable upon the ſtatute of *Magna Charta*, *cap.* 30. and what hath been before ſaid, 1. That if an alien enemy comes into *England* after the war begun, and lives here under the king's protection as a ſubject, yet if he practiſe treaſon againſt the king during ſuch his abode here, he may be indicted of high treaſon *contra ligeantiæ ſuæ debitum.* 2. Yet ſuch an alien, coming in after the war begun without the

the king's licence or ſafe conduct, cannot claim the privilege allowed by the ſtatute of *Magna Charta, cap.* 30. to thoſe that were here before the beginning of the war. 2 *Co. Inſt.* 58. 3. That by the law of *England* debts and goods found in this realm belonging to alien enemies belong to the king, and may be ſeized by him. 19 *E.* 4. 6. 7 *E.* 4. 13. and therefore in debt brought by an alien enemy it is a good plea in bar *primâ facie*, that the perſon is an alien born *in* G. *in partibus tranſmarinis ſub obedientâ* Philippi *regis* Hiſpaniæ *hoſtis & inimici domini regis*; ſo that, tho to ſome purpoſes he is under the king's protection, ſo as to be guilty of treaſon, if he conſpire againſt the king's life, yet his goods are not by law privileged from confiſcation, and the reaſon is, becauſe he might ſecure his goods by purchaſe of letters patents of denization, and he ſhall not take away the king's rights by his neglect therein.

But then, what if in truth our merchants have liberty of reclaiming their goods and recovering their debts in the hoſtile country? May the merchant plaintiff reply with this clauſe of the ſtatute of *Magna Charta*, that "*Noſtri mercatores ſalvi* "*ſunt ibi, &c.*"?

I anſwer, he cannot, for it is reſerved to another kind of trial; for the words are "*donec ſciatur a nobis vel a capitali* "*juſticiario noſtro, quomodo mercatores noſtri ibi tractentur.*" The king muſt be aſcertained of the truth of the fact, in whoſe cognizance it beſt lies; and if he be ſatisfied, that our merchants are permitted to recover their debts in the hoſtile kingdom without impediment or confiſcation, this is to be notified and declared by ſome proclamation, or inſtrument under the great ſeal declaring the fact, and allowing them to proſecute for their debts here; and then, by virtue of this ſtatute or public declaration, the merchant alien plaintiff may reply with this ſpecial matter in maintenance of his action.

Here ſomewhat may be of uſe to be ſaid touching treaſons by embaſſadors of forein princes, wherein altho ſometimes reaſon of ſtate and the common intereſt of princes do *de facto* govern in theſe caſes, yet it will not be amiſs to conſider

conſider the opinions and practices of former times in relation to this matter.

Firſt, If an *Engliſhman* born, tho he never took the oath of alligeance, becomes a ſworn ſubject to a forein prince, and is employed by him into *England* as his miniſter, agent or embaſſador, and here conſpires againſt the king's life, he ſhall be indicted and tried for treaſon, as another ſubject ſhould be; and the reaſon is, becauſe no man can ſhake off his country wherein he was born, nor abjure his native ſoil or prince at his pleaſure. This was the caſe of Dr. *Story*, who had ſworn alligeance to the crown of *Spain*, and was here condemned and executed for treaſon. *Vide Camden's Eliz.* 14 *Eliz. p.* 168. (*d*)

Secondly, But if a foreiner being the agent, miniſter or embaſſador of a forein prince either in amity or enmity with the king of *England* come over with or without the king's ſafe conduct, and here conſpire againſt the life of the king, or to raiſe rebellion or war againſt him, ſome have been of opinion, that he may be indicted of treaſon; but by the civilians he cannot, becauſe he came in as a forein embaſſador repreſenting the perſon of his prince, and therefore is not to be ſo dealt with in ſuch caſe, but by the law of nations may be dealt with as an enemy, not as a traitor; and tho he have the protection and ſafe conduct of the king of *England*, yet it is under a ſpecial capacity, and for a ſpecial end, namely, as a forein agent; but if he be criminally proceeded againſt, it muſt be as an enemy by the law of war or nations, and not as a traitor; but how far and in what caſes he may be dealt with as an enemy, remains to be farther conſidered. *Camden's Eliz. ſub anno* 1571. *p.* 164.

Thirdly, Therefore thoſe, that are moſt ſtrict after the rights and privileges of embaſſadors, yet ſeem to agree, that if he do not only conſpire the death of the king or the raiſing a rebellion againſt him, but actually attempt ſuch an act, as actually or interpretatively is a conſummation thereof, tho poſſibly

(*d*) *Engliſh Folio.*

poſſibly the full effect thereof do not enſue, yet he may be dealt withal as an enemy, and by the law of nations he may be put to death, as if he ſhould ſtab or poiſon the prince, and yet doth not kill him, or raiſe an actual rebellious army, or ſhould levy an actual war againſt the prince, to whom he was ſent, and in that prince's country, as *Fabius* (*e*) the *Roman* embaſſador to the *Gauls*, by challenging and fighting with the champion of the *Gauls*; *Plutarch in vitâ Numæ*, the prince, to whom he is ſent, may without conſulting the prince, that ſends him, inflict death upon ſuch an embaſſador by the law of nations, as an enemy: "*Conſumata autem ſunt, quæ eouſque producta ſunt, quo produci ab hominibus ſolent, & quæ delinquendi finem ſtatuere ſolemus. Vide Albericus Gentilis, Lib.* II. *cap.* 2. *de legationibus.*"

Fourthly, But in caſe of a bare conſpiracy againſt the life of the king, or a conſpiracy of a rebellion or change of government, *novarum rerum molimina*, there is great diverſity of opinions among learned men, how far the privilege of an embaſſador exempts him from penal proſecution as an enemy for ſuch conſpiracies or inconſummate attempts, that do not proceed farther than the machination, ſolicitation or conſpiracy.

Upon an attempt of this nature by the biſhop of *Roſſe*, agent and embaſſador of the queen of *Scots*, 14 *Eliz.* the queſtion was propounded to *Lewes*, *Dale*, *Drury*, *Aubry*, and *Jones*, doctors of law, *viz.*

"Whether an embaſſador, who ſtirreth up rebellion againſt the prince to whom he is ſent, ſhould enjoy the privileges of an embaſſador, and not be liable to the puniſhments of an enemy?"

They anſwered, that ſuch an embaſſador hath by the law of nations, and by the civil law of the *Romans* forfeited all the privileges of an embaſſador, and is liable to puniſhment. See the reſt of the reſolutions touching this matter *Camden's Eliz. ſub anno* 1571. *p.* 164, 165. *& ibidem p.* 370.

Hereupon he was committed to the *Tower*, but yet no criminal proceſs againſt him as an enemy.

(*e*) *Fabius Ambuſtus.*

And *Mendoza* the *Spaniſh* embaſſador, who here in *England* foſtered and encouraged treaſon, was not dealt with according to the utmoſt ſeverity, that poſſibly in ſuch caſes might be uſed, but was only ſent away, *ſub anno* 27 *Eliz. Camden's Eliz. p.* 296. The lord *L'Aubeſpine* alſo, the *French* embaſſador, that conſpired the queen's death, was not proceeded againſt criminally, but only reproved by *Burghley*, and adviſed to be more careful for the future. *Camden's Eliz. ſub anno* 1587. *p.* 378, 379.

And upon theſe and ſome antient inſtances among the *Romans* and *Carthaginians* learned men have been of opinion, that an embaſſador is not to be puniſhed as an enemy for traiterous conſpiracy againſt the prince, to whom he is ſent, but is only to be remitted to the prince, that ſent him. *Albericus Gentilis de Legationibus, Lib.* II. *cap.* 18. *Grotius de Jure Belli, Lib.* II. *cap.* 18. (*f*), who gives theſe two inſtances in confirmation thereof.

The truth is, the buſineſs of embaſſadors is rather managed according to rules of prudence, and mutual concerns and temperaments among princes, where poſſibly a ſevere conſtruction of an embaſſador's actions, and proſecutions of them by one prince may at another time return to the like diſadvantage of his own agents and embaſſadors; and therefore they are rather temperaments meaſured by politic prudence and indulgence, than according to the ſtrict rules of reaſon and juſtice; for ſurely conſpiracies of this kind by embaſſadors are contrary to the truſt of their employments, and may be deſtructive to the ſtate whereunto they are ſent, and according to true meaſures of juſtice deſerve to be puniſhed, as acts of enmity, hoſtility and treachery by private perſons.

And altho of all hands it is admitted, that the prince, to whom the embaſſador is ſent, is the judge of the miſcarriage of ſuch forein embaſſador without any application to the maſter, from whom he is ſent, and without any actual dedition or giving him up to the judgment of the law; yet they aſſign this reaſon of the difference between a bare conſpiracy or machination againſt the prince, and an actual attempt of

treaſon,

(*f*) *in notis ad* §. 4. *n.* 3.

treaſon, whether againſt his perſon or government, which hath attained as great a conſummtaion, as ſuch embaſſador is able to effect, as procuring the wounding of the prince, or an actual attempt to poiſon him, tho death enſue not, or an actual raiſing of a rebellious army againſt him; becauſe in theſe latter the miſchief is conſummate, as far as the embaſſador could effect it, and ſo prohibited not only by the civil and municipal laws, but by the laws of nations; but inconſummate machinations, according to their opinions, are raiſed to the *crimen læſæ majeſtatis* by civil or municipal laws or conſtitutions; and they think it too hard, that an embaſſador or forein agent, who doth *ſuſtinere perſonam principis*, ſhould be obnoxious to a capital puniſhment for bare machination or conſpiracy, which is a ſecret thing and of great latitude; but this, as I have ſaid, is rather a prudential and politic conſideration, and not according to the ſtrict meaſure of juſtice.

But now, altho it ſhould be admitted that a forein embaſſador committing a conſummate treaſon is not to be proceeded againſt as a traitor, but as an enemy; yet if he, or his aſſociates commit any other capital offenſe, as rape, murder, theft, they may be indicted and proceeded againſt by indictment in an ordinary courſe of juſtice, as other aliens committing like offenſes; for tho thoſe indictments run *contra pacem regis*, yet they run not *contra ligeantiæ ſuæ debitum*; and therefore, when in the late troubles the brother and ſervants of the *Portugal* embaſſador committed a murder in the *Exchange* (*g*), they were tried and convicted by a ſpecial commiſſion of *oyer* and *terminer* directed to two judges of the common law, ſome civilians, and ſome gentlemen, to proceed according to the ordinary courſe *ſecundum legem & conſuetudinem regni* Angliæ, whereupon ſome of them were convict by jury, and had judgment; and, as I remember, ſome of them were executed (*h*). And yet many civili-

ans

(*g*) The *New Exchange* in the *Strand*.

(*h*) Don *Pantaleon Sa*, the embaſſador's broſher, was condemned to die for it; he had like to have prevented his execution by making his eſcape out of *Newgate*, but he was retaken, and beheaded on *Tower-hill*, *July* 10, 1654. the ſame day the embaſſador ſigned the peace between *England* and *Portugal*.

ans (*i*) allow the ſame privilege to the *comites legati*, as to the embaſſador himſelf.

And the difference between proceeding againſt an alien (whether embaſſador or other) in caſes of felony and treaſon, is well illuſtrated by the book of 40 *Aſſ.* 25. where a *Norman* captain of a ſhip with the help of *Engliſh* mariners committed robbery and piracy upon the narrow ſeas; the *Engliſh* pirates were convict and attaint of treaſon (*k*), but the *Norman* captain was attaint of felony, but not of treaſon, becauſe it could not be ſaid *contra ligeantiæ ſuæ debitum*.

The queen conſort the wife of the king, or the huſband of the queen regent, compaſſing the death of the king her huſband or the queen regent his wife, are perſons compaſſing within this act. *Co. P. C. p.* 8.

II. As to the ſecond inquiry, what ſhall be ſaid *a king, queen*, or *their eldeſt Son*, within this law.

1. The words *our lord the king, &c.* extend to his ſucceſſor, as well as to him. (*l*)

1. Becauſe it is a declarative law.

2. Becauſe uſually acts of parliament ſpeaking thus generally, and not confining it to the perſon of that king, when the law paſſed, *include his ſucceſſor*; therefore the ſtatute of 8 *H.* 6. *cap.* 11. 23 *H.* 8. *for Brewers*, 27 *H.* 8. *cap.* 24. that were limited to continue during the pleaſure of our lord the king (*m*), continued after that king's death: *Mich.* 38 & 39 *Eliz. Cro. Eliz.* 513. Lord *Darcie*'s caſe. The ſtatute of 11 *H.* 7. *c.* 1. of aiding our lord the king in his wars extends to the ſucceſſor (*n*). *Hill.* 10 *Jac.* 12 *Co. Rep.* 109. *M.* 24 *Eliz. Moore* 176.

(*i*) *Dig. Lib.* XLVIII. *tit.* 6. *ad leg. Jul. de vi publica, l.* 7. *Grot. de jur. Belli, Lib.* II. *cap.* 18. §. 8.

(*k*) For before the 25 *E.* 3. piracy was petit treaſon. *Co. P. C.* 113. and tho this caſe be quoted in the 40 *E.* 3. yet it muſt be intended to have heppend before the ſtatute of 25 *Ed.* 3. becauſe piracy, not being enumerated therein among the ſpecies of treaſon, has never been counted treaſon ſince that ſtatute. *Co. P. C.* 8.

(*l*) *Vide Co. P. C. p.* 6.

(*m*) Of theſe ſtatutes the firſt only is ſo limited; but the 23 *H.* 8. *cap.* 4. *ſect.* 5, 14. and 27 *H.* 8. *cap.* 24. *ſect.* 10. only name the king without the addition of *his heirs and ſucceſſors*. 10 *H.* 7. 7. *b.* It is ſaid by *Noble* with relation to 9 *H.* 6. *cap.* 2. and not denied by the court, that where a ſtatute limits *to continue ſo long as it ſhall pleaſe our lord the king*, it continues in force, if no proclamation be made to the contrary in the times of that king or of any of his ſucceſſors.

(*n*) This ſtatute comes not up to the point, becauſe the words of it are not, *our lord the king*, but, *the king and ſovereign lord of this land for the time being*. Our author ſeems to have intended the *Iriſh* ſtatute of 10 *H.* 7. called *Poyning's*

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176. *Coke Litt.* 9. *b.* (*o*). But the ſtatute of 34 & 35 *H.* 8. *cap.* 26. giving power to our ſaid lord the king to alter the laws of *Wales*, died with him (*p*); yet *in majorem cautelam* it was ſpecially repeald by the ſtatute of 21 *Jac. cap.* 10.

2. The heir of the king is a king within this act the next moment after the death of his anceſtor, and commenceth his reign the ſame day the anceſtor dies; and therefore the compaſſing his death before coronation, yea before proclamation of him, is a compaſſing of the king's death, for he is a king preſently upon the anceſtor's death; and the proclamation or coronation are but honourable ceremonies (*q*) for the farther notification thereof: reſolved 1 *Jac.* in the caſe of *Watſon* and *Clerk. Co. P. C. p.* 7.

3. The queen regent, as were queen *Mary* and queen *Elizabeth*, is a king within this act. (*r*)

4. A king *de facto* but not *de jure* (*ſ*), ſuch as were *H.* 4. *H.* 5. *H.* 6. *R.* 3. *H.* 7. being in the actual poſſeſſion of the

Poyning's act, upon which act a doubt was conceived, whether it extended to the ſucceſſors of *H.* 7. for that the act ſpeaks only of the king generally, and not of his ſucceſſors: the chief juſtices, chief baron, attorney, and ſollicitor general were of opinion, that the word *king* imported his politic capacity, which never dies; and therefore being ſpoke indefinitely, extended in law to all his ſucceſſors, and was ſo expounded by an *Iriſh* act in the 3 & 4 *Phil. & Mar.* 12 *Co. Rep.* 109.

(*o*) The caſe in *Moore* relates to ſtatutes *during the pleaſure of the king*: the words are, "*Walmeſley* moved a "queſtion, whether the demiſe of the "king determines a ſtatute limited to "continue during the king's pleaſure, and "the whole court agreed that the demiſe "of the king determines his will."

(*p*) The words of that ſtatute, §. 119. are, "*That the king's moſt royal majeſty* "*ſhall and may*, &c. *as to his moſt excellent* "*wiſdom and diſcretion ſhall be thought* "*convenient*; *and alſo to make laws*, &c. *at* "*his majeſty's pleaſure.*" It was reſolved by the juſtices *Hil.* 5 *Jac.* 12 *Co. Rep.* 48. that this was a temporary power, and confined to the perſon of king *Henry* VIII. *Vide Plowden* 176. *b.* &c. 458. *a.*

(*q*) The coronation is ſomething more than only an honourable ceremony, for it is a ſolemn engagement to govern according to law, which was always required by the antient conſtitution of the kingdom. *Brompton* ſpeaking of the coronation of *W.* 1. ſays the archbiſhop of *York* performed the office, *Ipſumque* Gulielmum *regem ad jura eccleſiæ* Anglicanæ *tuenda & conſervanda, populumque ſuum recte regendum, & leges rectas ſtatuendum ſacramento ſolemniter adſtrinxit*; and *Bract. Lib.* III. *cap.* 9. ſays that the king of *England debet in coronatione ſua in nomine Jeſu Chriſti præſtito ſacramento hæc tria promittere populo ſibi ſubdito*, &c. See alſo 1 *W. & M. cap.* 6.

(*r*) *Vide Co. P. C. p.* 7. This appears by the declarative law in favour of queen *Mary*, 1 *Mar. cap.* 1. *ſect.* 3.

(*ſ*) This diſtinction, which with reſpect to the kingly office was never known in our law before the ſtatute of 1 *E.* 4. ſeems to have been purpoſely invented to ſerve the turn of the houſe of *York*; nor do I find any ſuch diſtinction ever mentiond or ſuppoſed in any of our antient law-books, ſave only in *Bagot*'s caſe, 9 *E.* 4. 1. *b.* cited by our author *p.* 61. for the doubt conceived by *Markham*, 4 *E.* 4. 43. *a.* concerning the authority

crown is a king within this act, ſo that compaſſing his death is treaſon within this law; and therefore the 4 E. 4. 20. a.

thority of coroners choſen in the time of *H.* 6. was not founded (as ſome have ſuppoſed) on *H.* 6. being only king *de facto*, but on another point, *viz.* whether the demiſe of the crown did not determine the power of coroners, as it does the commiſſions of judges and other commiſſioners; and as to *Bagot*'s caſe, if carefully conſidered, it will but little ſerve the purpoſe of ſuch a diſtinction, for the principal point in that caſe was concerning the validity of letters patent of denization granted to *Bagot* by *H.* 6. whether they were void by the act of 1 *E.* 4. ſet forth in the pleadings; this point was not argued by the judges, but by the ſerjeants and apprentices. 9 *E.* 4. 2. *a.* it will therefore be neceſſary to diſtinguiſh the diſcourſe of the counſel from the reſolution of the court.

Bagot's counſel aſſerted, "That all "judicial acts relating to royal juriſ"diction, which were not in diminution "of the crown, tho done by an uſurper, "would nevertheleſs bind the king *de* "*jure* upon his regreſs, that *H.* 6. was "not merely an uſurper, the crown ha"ving been entailed on him by parlia"ment, that *Bagot*'s denization was an "advantage to the prince on the throne, "for the more ſubjects he had, the bet"ter it was for him; and they likened "it to the caſe of recoveries ſuffered in "a court-baron, while the diſſeiſor was "in poſſeſſion, which would continue in "force notwithſtanding the re-entry of "the diſſeiſee."

This was all that could be expected for them to ſay, conſidering that *E.* 4. was then on the throne, and they were obliged to admit, that grants of the regal revenue made by *H.* 6. were void againſt *E.* 4. becauſe the act of parliament of *E.* 4. which declared *H.* 4. *H.* 5. and *H.* 6. uſurpers, veſted in *E.* 4. *all ſuch manors, caſtles, honors, liberties, franchiſes, reverſions, remainders,* &c. *and all hereditaments with their appurtenances, whatſoever they were, in* England, Wales *and* Ireland, *and in* Calais, *as king* Richard *II. had on the feaſt of St.* Matthew *the twenty-third year of his reign in right of the crown of* England *and lordſhip of* Ireland: all meſne grants therefore of ſuch manors, &c. were by this act indiſputably defeated.

The counſel on the other ſide objected, "That the letters patent of denization "were void, for that the king ought "not to be in a worſe condition than a "common perſon; and that if a com"mon perſon were diſſeiſed and re-en"tred, his re-entry would defeat all meſne "acts; and that therefore *E.* 4. being "in by deſcent from king *Richard*, and "this act being but an affirmance of the "common law, his regreſs would avoid "all acts done by the uſurper, for which "reaſon proviſion was made in that act "for grants of wards, licences of mor"maine, charters of pardon and judicial "acts, but no proviſion was made for "grants of denization; that the patent "in controverſy was to the diſadvantage "of the king, ſince it was not reaſon"able, that ſuch an alien ſhould be "made his ſubject againſt his will, "for by the ſame reaſon *H.* 6. might "have made twenty thouſand *Frenchmen* denizens; that if a league was "made between *H.* 6. and another king, "it would not bind *E.* 4. and yet ſuch "league is intended for the advantage of "the realm; that an exemption granted "by *H.* 6. from being put upon juries "in aſſiſes, &c. would now be void."

Here *Billing* the chief juſtice interpoſed and ſaid, *I do not agree to this*; he added, "*It pertains to every king by rea*"*ſon of his office to do juſtice and grace,* "*juſtice in executing the laws,* &c. "*and grace in granting pardon to fe*"*lons, and ſuch legitimation as this is.*" *Yelverton* ſeemed at firſt to think that the denization was void, not becauſe the regreſs of *E.* 4. avoided all meſne acts done by *H.* 6. but becauſe the act of 1 *E.* 4. reſumed all *liberties* and franchiſes, and denization being a *liberty* was therefore reſumed.

The cauſe was adjourned, during which time it was abated by the death of *Swireden* one of the plaintiffs; a new aſſiſe was brought by *Bagot*, and the ſame matter was pleaded as before; the aſſiſe was taken, and the verdict was in favour of *Bagot* 9 *E.* 4. 3. the defendant's counſel

20. *a.* (*t*), a perſon that compaſſed the death of *H.* 6. was attainted for that treaſon in the time of the rightful king; but had it been an act of hoſtility in aſſiſtance of the rightful heir of the crown (*), which afterwards obtained, this had not been treaſon, but *e converſo* thoſe that aſſiſted the uſurper, tho in actual poſſeſſion of the crown, have ſuffered as traitors, as appears by the ſtatute of 1 *E.* 4. (†), and as was done upon the aſſiſtants of *H.* 6. after his temporary re-adeption of the crown in 10 *E.* 4. and 49 *H.* 6.

5. A king admitting by act of parliament his ſon *in conſortium imperii*, as was done by *H.* 2. whereby there was *rex pater* and *rex filius*, only the father reſerved to himſelf the lige homage or alligeance of his ſubjects, yet the ſon actually adminiſtred the kingdom; the father continued a king, and a trea-

moved in arreſt of judgment, and *Brian* (who was of counſel againſt *Bagot*, and not one of the judges) repeated the former objection, that ſince *E.* 4. was in poſſeſſion by remitter, as coſſin and heir of king *Richard*, the patent of denization by *H.* 6. who was but an uſurper and intruder was void. 9 *E.* 4. 11. but the juſtices ſaid, that they had conferd upon all points of this caſe with the juſtices of the common pleas, and they were all of opinion, that thoſe matters were not ſufficient to arreſt judgment; and accordingly judgment was given for *Bagot* 9 *E.* 4. 12. *a.* abridged in *Br. Patents* 21. *Denizen* 3. *Charter de Pardon* 22. *Exemption* 4. *Judgment* 42. *F. Abſq.* 29. *Denizen* 1.

From this ſtate of the caſe it appears, that the queſtion was entirely upon the conſtruction of an *act of parliament*, and not upon any maxims of *common law*; and tho it was ſaid, that that act was an affirmance of the common law, yet that was only the ſaying of *counſel*, and unſupported by any book-caſe or record: ſo that the diſtinction here taken by our author between a *rex de facto* and a *rex de jure* being no way warranted by the conſtitution or common law of this kingdom, all that is here ſaid by him on that ſuppoſition muſt fall to the ground.

(*t*) This caſe is cited before by our author *p.* 61. but is ſomewhat differently related in *Stow's Annals*, *p.* 418. *Sild. Titles of Honour*, *cap.* 5. *p.* 634.

(*) But who ſhall take upon them to determine who that is? Our author therefore prudently adds, *which afterwards obtains*, for this is the moſt effectual way of deciding queſtions of this nature; but then by the ſame rule, *if he ſhould not obtain*, ſuch act of hoſtility had been treaſon, for it cannot be imagined, that any prince in the actual poſſeſſion of the government will ſuffer his own title to be diſputed, nor indeed is it fitting, that private ſubjects ſhould ſet themſelves up for judges in ſuch an affair, whoſe duty it is to pay a legal obedience to the powers, that are in fact ſet over them; *for the powers*, that be, *are ordained of God. Rom.* xiii. 1.

This ſerves to ſhew how idle the diſtinction is between a *rex de jure* and a *rex de facto*, which is not only founded on a precarious bottom, but alſo muſt in fact prove a diſtinction without a difference, being equally ſervicable to all ſides and parties; and thus it was in regard of *H.* 6. and *E.* 4. who were both of them by turns declared by parliament to be rightful kings and uſurpers.

(†) This muſt have been for acts before *E.* 4. firſt obtaind the crown, and therefore was wrong according to our author's own doctrine, becauſe, as he ſays below, even the rightful heir before he has got poſſeſſion of the crown is not a king within the ſtatute of 25 *E.* 3.

a treaſon committed againſt him by his ſon or any of his ſubjects was treaſon within this act; and ſo was the ſon a king within this act, as in reference to all but the father, a ſubordinate king, that had the *jura imperii*, as the king of *Scots* was after his homage done to king *Edward* I. and therefore compaſſing his death by any of his ſubjects had been high treaſon within this act, if it had been then made; for it is miſtaken in lord *Coke*'s *P. C. p.* 7. that *H.* 2. reſigned his crown, for he continued ſtill *rex de facto & de jure*, as *Hoveden* tells us. *Vide ſupra cap.* 10.

Having thus ſhewn who is a king within this act, we ſhall the more eaſily ſee who is not a king within this act.

1. The right heir of the crown, during ſuch time as the uſurper is in plenary poſſeſſion of it, and no poſſeſſion thereof in the heir, is not a king within this act; ſuch was the caſe of the houſe of *York* during the plenary poſſeſſion of the crown in *H.* 4. *H.* 5. *H.* 6. but if the right heir had once the poſſeſſion of the crown as king, tho an uſurper hath gotten the poſſeſſion thereof, yet the other continues his ſtyle, title and claim thereunto, and afterwards re-obtains the full poſſeſſion thereof, a compaſſing the death of the rightful heir during that interval, is a compaſſing of the king's death within this act, for he continued a king ſtill, *quaſi* in poſſeſſion of his kingdom; this was the caſe of *E.* 4. in that ſmall interval, wherein *H.* 6. re-obtaind the crown, and the caſe of *E.* 5. notwithſtanding the uſurpation of his uncle *R.* 3.

2. If a king voluntarily reſign, as ſome in other countries have done, and this reſignation admitted and ratified in parliament, he is not afterwards a king within this act (*u*); but we never had ſuch an example in *England*, for that of *R.* 2. was a conſtrained act, touching which and the depoſition of *E.* 2. I ſhall not ſay farther, for they were acts of great violence and oppreſſion.

Only

3

(*u*) The ſame reaſon holds in the caſe of a king, who is deemed by parliament to have abdicated, or by actions ſubverſive of the conſtitution virtually to have renounced the government; this was the caſe of king *James* II. who, tho not in words, yet by acts and deeds equally expreſſive had renounced holding the crown upon the terms of the conſtitution.

Only thus much is certain, that altho *E.* 2. had a kind of pretended depoſing, and his ſon *E.* 3. took upon him the kingly name, and office, yet in the opinion of thoſe times *E.* 2. continued, as to ſome purpoſes, his regal character, for in the parliament of 4 *E.* 3. *Mortimer*, *Berisford*, *Gurney*, and others had judgment of high treaſon given againſt them for the death of *E.* 2. after his depoſition. *See C. L. 109.*

Neither was this judgment grounded ſimply upon that old opinion in *Briton* (*x*), that killing of the king's father was treaſon; for, tho in ſome parts of that record, as in the judgment of the lords againſt *Mortimer*, the words are, *Touchant le mort ſeigneur* Edward *pere noſtre ſeigneur le roy, qe ore eſt,---countes, barons, & peres, come jugges de parlement, agarderent & adjuggerent le dit* Roger, *come treſor & enemy de roy & de realme, ſeuſt treine & pendu*; yet in other parts of that roll of parliament he is ſtyled at the time of his murder *ſeignior lige*, and ſometimes *rex*, as *n.* 6. The lords make their proteſtation, that they are not to judge any but their peers; yet they declare, that they gave judgment upon ſome, that were not their peers, in reſpect of the greatneſs of their crimes; *et ce per encheſon de murder de ſeigneur lige, &c.* and in the arraignment of *Thomas* lord *Berkele* for that offenſe, the words of the *record* are, *Qualiter ſe velit acquietare de morte ipſius domini regis*, who pleaded, *Quod ipſe de morte ipſius domini regis in nullo eſt inde culpabilis*; and the verdict, as it was given in parliament 4 *E.* 3. *n.* 16. and the record is, *Quod prædictus* Thomas *in nullo eſt culpabilis de morte prædicti domini regis patris domini regis nunc*; ſo that the record ſtyles him *rex* at the time of his death, and yet every one acquainted with hiſtory knows, that his ſon was declared king, and took upon him the kingly office, and title upon the twenty-fifth, or, according to *Walſingham*, the twentieth of *January*; and *E.* 2. was not murdered till the twenty-firſt of *September* following.

I have been the longer in this inſtance, tho it were before the making of the ſtatute of 25 *E.* 3. when treaſon was determined according to the common law, that it may appear,

(*x*) *Brit. cap.* 22. *Co. P. C. f.* 7.

that this judgment was not ſingly upon this account, that he was father to king *E.* 3. but that notwithſtanding the formal depoſing of him, and that pretended or extorted reſignation of the crown mentiond by the hiſtories of that age, yet they ſtill thought the *character regius* remaind upon him, and the murder of him was no leſs than high treaſon, namely the killing of him, who was ſtill a king, tho deprived of the actual adminiſtration of his kingdom.

3. The huſband of a queen regent is not a king within this law, for the queen ſtill holds her ſovereignty entirely, as if ſhe were ſole: *vide* 1 *Mar. cap.* 2. *ſeſſ.* 3. and for the remedy hereof there was a ſpecial temporary act made enacting and extending treaſon as well to the compaſſing of the death of king *Philip* of *Spain* huſband to queen *Mary*, as of the queen, and for the making of other acts againſt the king, as againſt the queen, within the compaſs of high treaſon, during the continuance of the marriage between them. 1 *&* 2 *Phil. & Mar. cap.* 10. ſo that it ſeems, tho the huſband of a queen regent be as near to him, as the wife of a king regnant, the ſtatute of 25 *E.* 3. declaring the compaſſing of the death of the king's wife to be treaſon, did not extend to the huſband of a queen regent. (*y*)

4. A *prorex*, *viceroy*, *cuſtos regni*, or *juſtitiarius Angliæ*, which import in ſubſtance the ſame office, *viz.* the king's lieutenant in his abſence out of the kingdom, is not a king within this act (*z*), tho his power be very great, and all commiſſions, writs, and patents paſs under his *teſte*; and the ſame law is touching the lord lieutenant or *juſtitiarius Hiberniæ* or his deputy. *Vide ſtatut. Hiberniæ.*

Rot. Parl. 31 *H.* 6. *n.* 38 *&* 39. *Richard* duke of *York* by the king's letters patent, and by conſent of parliament was conſtituted *protector & defenſor regni, & eccleſiæ* Anglicanæ, *& conſiliarius regis principalis*, till the full age of the prince, or till diſcharged of that employment by the king in parliament, by the conſent of the lords ſpiritual and temporal; tho this were a high office, and exceeded much the power of a protector of the king during his minority, ſuch

2 as

(*y*) *Co. P. C. p.* 6, 7. (*z*) *Co. P. C. p.* 8.

as were the earl of *Pembroke* to *H.* 3. and the duke of *Somerſet* to *E.* 6. yet this protector was not a king within this ſtatute.

III. I come to the third diviſion, what ſhall be ſaid *a compaſſing or imagining of the death* of the king, queen, or prince.

The words *compaſs or imagine* are of a great latitude.

1. They refer to the purpoſe or deſign of the mind or will, tho the purpoſe or deſign take not effect.

2. Compaſſing or imagining ſingly of it ſelf is an internal act, and without ſomething to manifeſt it could not poſſibly fall under any judicial cognizance, but of God alone; and therefore this ſtatute requires ſuch an overt-act, as may render the compaſſing or imagining capable of a trial and ſentence by human judicatories.

And yet we find that other laws, as well as ours, make compaſſing or conſpiring the death of the prince to be *crimen læſæ majeſtatis*, tho the effect be not attained.

Ad legem Juliam *majeſtatis in Codice* (*a*) in the law of *Honorius* and *Arcadius*, *Quiſquis cum militibus, vel privatis, vel barbaris ſceleſtam inierit factionem, vel factionis ipſius ſuſceperit ſacramentum vel dederit, de nece etiam virorum illuſtrium, qui conſiliis & conſiſtorio noſtro interſunt, ſenatorum etiam, (nam & ipſi pars corporis noſtri ſunt) vel cujuſlibet poſtremò, qui nobis militat, cogitaverit, (eadem enim ſeveritate voluntatem ſceleris, quâ effectum, puniri jura voluerunt) ipſe quidem, utpote majeſtatis reus, gladio feriatur, bonis ejus omnibus fiſco noſtro additis.*

A bare accidental hurt to the king's perſon, in doing a lawful act, without any deſign or compaſſing of bodily harm to the king, ſeems not a compaſſing of the king's death within this act.

Walter Tirrel by command of *William Rufus* ſhot at a deer; the arrow glanced from an oak, and killed the king; *Tirrel* fled, but this being purely accidental, without intention of doing the king any harm, hath been held not to be a compaſſing of the king's death. *Co. P. C. p.* 6. *Paris & Hoveden anno ult. Willielmi ſecundi.*

Calculating

(*a*) *Lib.* IX. *tit.* 8. *l.* 5. *pr.*

Calculating of the king's nativity, or thereby or by witchcraft, *&c.* ſeeking to know, and by expreſs words, writing, *&c.* publiſhing and declaring how long the king ſhall live, or who ſhall ſucceed him, or adviſedly or maliciouſly to that intent uttering any prophecies, ſeems not a compaſſing of the king's death within the ſtatute of 25 *E.* 3. (*b*), but was made felony during the life of queen *Elizabeth* by 23 *Eliz. cap.* 2. and before that was only puniſhable by fine and ranſom. *Co. P. C. p.* 6.

Compaſſing the death of the king is high treaſon (*c*), tho it be not effected; but becauſe the compaſſing is only an act of the mind, and cannot of it ſelf be tried without ſome overt-act, to evidence it, ſuch an overt-act is requiſite to make ſuch compaſſing or imagination high treaſon. *De quo infra.*

IV. Therefore as to the *overt-act* in caſe of compaſſing the death of the king, queen, or prince.

1. Tho the words in the ſtatute of 25 *E.* 3. *and be provably thereof attaint by open deed*, &c. come after the clauſe of levying of war, yet it refers to all the treaſons before-mentiond, *viz.* compaſſing the death of the king, queen, or prince. *Co. P. C.* 6. 12. and therefore what is ſaid here concerning the compaſſing of the death of the king is applicable to queen and prince.

And therefore in an indictment of treaſon for compaſſing the death of the king, queen, or prince, there ought to be ſet down both the treaſon itſelf, *viz. Quod proditoris compaſſavit & imaginatus fuit mortem & deſtructionem domini regis, & ipſum dominum regem interficere*, and alſo the overt-act, *& ad illam nefandam & proditoriam compaſſationem & propoſitum perimplend*, and then ſet down the particular overt-act certainly and ſufficiently, without which the indictment is not good. *Co. P. C. p.* 12.

2. If

(*b*) Even before that ſtatute, *viz. Hil.* 18 *Ed.* 2. *Rot.* 24. *rex coram rege*, there was an inſtance of ſeveral perſons charged with endeavouring to compaſs the king's death by necromancy by making his image in wax, *&c.* yet they were appeald only *de felonia & maleficio*, and were all acquitted by the jury.

(*c*) Inſomuch that where the king is actually murdered, it is the compaſſing his death, which is the treaſon, and not the killing, which is only an overt-act. *Kel.* 8.

2. If men conſpire the death of the king and the manner, and thereupon provide weapons, powder, harneſs, poiſon, or ſend letters for the execution thereof; this is an overt-act within this ſtatute. *Co. P. C. p.* 12.

3. Tho the conſpiracy be not immediately and directly and expreſly the death of the king, but the conſpiracy is of ſomething, that in all probability muſt induce it, and the overt-act is of ſuch a thing, as muſt induce it; this is an overt-act to prove the compaſſing of the king's death, which will be better explaind by the inſtances themſelves, and therefore.

4. If men conſpire to impriſon the king by force and a ſtrong hand, 'till he hath yielded to certain demands, and for that purpoſe gather company or write letters, this is an overt-act to prove the compaſſing of the king's death, for it is in effect to deſpoil him of his kingly government, and ſo adjudged by all the judges in the lord *Cobham*'s caſe, 1 *Jac.* (*d*) and in the caſe of the earl of *Eſſex*, 43 *Eliz.* (*e*). *Co. P. C. p.* 12. But then there muſt be an overt-act to prove that conſpiracy to reſtrain the king, and then that overt-act to prove ſuch a deſign is an overt-act to prove the compaſſing the death of the king.

But then this muſt be intended of a conſpiracy *forcibly* to detain or impriſon the king; and therefore, when in the time of *R.* 2. in parliament a commiſſion was ſomewhat hardly gotten from the king, which ſeemed to curb his prerogative too much, the anſwer of the judges to the general queſtion, "*Qualem penam merentur illi, qui compulerunt ſive* "*arctarunt regem ad conſentiendum dict' ſtatus ordination'* "*& commiſſion? ad quam queſtionem unanimiter reſponde-* "*runt, quod ſunt, ut proditores, meritò puniendi, Rot. Parl.* 11 "*R.* 2. (*f*)." was too raſh and inconſiderate, and for which the judges themſelves were condemned as traitors, as before is ſhewn (*g*); for *compulerunt* and *arctaverunt* may have a double conſtruction, either it may be intended of an actual force uſed upon the perſon of the king, as by reſtraint, impriſon-

(*d*) *State Trials, Vol.* I. *p.* 206.
(*e*) *State Trials, Vol.* I. *p.* 199.
(*f*) *State Trials, Vol.* I. *p.* 9.
(*g*) *cap.* 11. *p.* 94.

ment, or injury to his perſon, to enforce his conſent to that commiſſion; and then it had not differd from the execrable treaſon of the *Spencers*, who declared, that ſince the king could not be reformed by ſuit of law, it ought to be done *per aſpertee*, for which they were baniſhed by two acts of parliament (*b*). *vide* 7 *Co. Rep. fol.* 11. in *Calvin's* caſe. 2. Or it might be intended, not of a perſonal compulſion upon the king, but by not granting ſupplies, or great perſuaſion or importunity, and then it could not be treaſon; the latter whereof was the only compulſion or arctation, which was uſed for the obtaining of that commiſſion.

And therefore the judges, that delivered that opinion, were inexcuſable in their deciſion of treaſon under ſuch ambiguous and large expreſſions of *compulerunt & arctaverunt*; and tho the parliament of 11 *R.* 2. was repeald by 21 *R.* 2. yet that again was repeald 1 *H.* 4. *cap.* 3.

5. A conſpiring to depoſe the king, and manifeſting the ſame by ſome overt-act, is an overt-act to prove the compaſſing of the death of the king within this act of 25 *E.* 3. *vide* 1 *Mar. B. Treaſon* 24. (*i*). *Co. P. C. p.* 12.

It is true, that by the ſtatute of 21 *R.* 2. *Ca.* 3. it was enacted, *That every man that compaſſeth or purpoſeth the death of the king, or to depoſe him, or to render up his homage liege, or he that raiſeth people, and rideth againſt the king to make war within his realm, and of that be duly attainted, and adjudged in parliament, ſhall be adjudged as a traitor of high treaſon againſt the crown*; and this act is particularly repeald by the ſtatute of 1 *H.* 4. *cap.* 10. as a great ſnare upon the ſubject; for it is recited, that by reaſon thereof no man knew *how he ought to behave himſelf, to do, ſpeak, or ſay for doubt of ſuch pains of treaſon.*

But

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(*b*) One in the reign of *Edward* II. called *Exilium Hugonis le Spencer*; and the other *in anno* 1 *Edward* III. *cap.* 1.

(*i*) *Broke* makes this *quære*: "*Quære del depriv'; car home poet depriver, & uncore intende null morte, & pur ceſt cauſe un ſtatute fuit ent fait tempore* H. 8. & E. 6. *Nota.*" The ſtatutes here referd to are 26 *H.* 8. *cap.* 13. by which it was made high treaſon "*to wiſh or deſire by words or writing, or to imagine, invent, or attempt to deprive the king, the queen, or their heirs apparent of the dignity, title or name of their royal eſtates.*" And 1 *E.* 6. *cap.* 12. by which it was made highly penal (for the third offenſe high treaſon) "*to compaſs or imagine by open preaching, expreſs words or ſayings, to depoſe or deprive the king, his heirs, or ſucceſſors, kings of this realm from his or their royal eſtate or titles to or of the realm aforeſaid.*

But the true reaſon was not in regard of the four points themſelves, for many of them were treaſons within the ſtatute of 25 *E.* 3. but that, wherein the act of 21 *R.* 2. varied from the act of 25 *E.* 3. were theſe: 1. That the compaſſing to levy war is made treaſon by the ſtatute of 21 *R.* 2. whereas the levying of war only was treaſon by 25 *E.* 3. Again 2dly, Tho compaſſing the death of the king was treaſon within the letter of 25 *E.* 3. and compaſſing to depoſe him was an evidence or overt-act of a compaſſing of the king's death within the meaning of the act of 25 *E.* 3. yet both required an overt-act. The ſtatute of 21 *R.* 2. makes the bare purpoſing, or compaſſing, treaſon, without any overt-act; and tho it reſtrain the judgment thereof to the parliament, yet it was too dangerous a law to put mens bare intentions upon the judgment even of parliament under ſo great a penalty, without ſome overt-act to evidence it: this was one reaſon of the repeal of the treaſons declared by the ſtatute of 21 *R.* 2. but this was not all, for in that parliament of 21 *R.* 2. the reſolutions of the judges to the queſtions propounded by the king are entred at large, and received an approbation not only by the ſuffrage of ſome other judges and ſerjeants, but by the ſtatute made in the ſame parliament, as appears at large by the ſtatute of 21 *R.* 2. *cap.* 12.

And therefore, wholly to remove the prejudice that might come to the king's ſubjects by thoſe raſh and unwarrantable reſolutions, the ſtatute of 1 *H.* 4. *Ca.* 10. was made, reducing treaſons to the ſtandard of 25 *E.* 3. and the entire parliament of 21 *R.* 2. alſo repeald as appears 1 *H.* 4. *Ca.* 3.

6. Regularly words, unleſs they are committed to writing, are not an overt-act within this ſtatute. *Co. P.C. p.* 14. (*k*); and the reaſon given is, becauſe they are eaſily ſubject to be miſtaken,

(*k*) *Vide Co. P. C. p.* 38, 140. The paſſages quoted *S. P. C.* 2. *b.* from *Bracton* and *Briton*, only deſcribe the form of the accuſation, but are far from proving that words alone were, in the opinion of thoſe writers, a ſufficient evidence of treaſon; but if they were ſo at common law, yet it does not follow, that they would be ſo by the ſtatute of 25 *E.* 3. which expreſly requires the proof of an overt-act, and conſequently diſallows the evidence of bare words, for *words* and *acts* are contra-diſtinguiſhed from each other. See *Co. P. C.* 14. *in margine.* The preamble of 1 *Mariæ, cap.* 1. *ſect.* 1. makes it matter of complaint, *that many had for words only ſuffered grievous death.*

miſtaken, or miſapplied, or miſrepeated, or miſunderſtood by the hearers. (*l*)

And this appears by thoſe ſeveral acts of parliament, which were temporary only, or made ſome words of a high nature to be but felony. *Co. P. C. cap.* 4. *p.* 37. The ſtatute of 3 *H.* 7. *cap.* 14. makes conſpiring the king's death to be felony; which it would not have done, if the bare conſpiring without an overt-act had been treaſon.

26 *H.* 8. *cap.* 13. malicious publiſhing by expreſs writing or words, that the king were an heretic, ſchiſmatic, tyrant, infidel, or uſurper, enacted to be high treaſon. (*m*)

1 *E.* 6. *cap.* 12. If any perſon or perſons do affirm or ſet forth by open preaching, expreſs words or ſayings, that the king, his heirs or ſucceſſors, is not, or ought not to be ſupreme head of the church of *England* and *Ireland*; or is not or ought not to be king of *England*, *France* and *Ireland*; or do compaſs or imagine by open preaching, expreſs words or ſayings to depoſe or deprive the king, his heirs or ſucceſſors from his or their royal eſtate or titles aforeſaid, or do openly publiſh or ſay by expreſs words or ſayings, that any other perſon or perſons, other than the king, his heirs or ſucceſſors, of right ought to be kings of this realm; every ſuch offender being convicted for his firſt offenſe ſhall forfeit his goods, and be impriſoned during the king's pleaſure; for the ſecond offenſe ſhall loſe his goods and the profits of his lands during life, and ſhall ſuffer impriſonment during life; and the third offenſe is made high treaſon.

But if this be done by writing (*n*), printing, overt-deed or act, then every ſuch offenſe is high treaſon by the act of 25 *E.* 3.

So

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(*l*) This is one but not the only reaſon, for another reaſon was, becauſe men in a paſſion or heat might ſay many things, which they never deſigned to do; the law therefore required, that in a caſe of ſo nice a nature, where the very intention was ſo highly penal, the reality of that intention ſhould be made evident by the doing ſome act in proſecution thereof.

(*m*) This ſame ſtatute makes it high treaſon to wiſh or deſire by words or writing to deprive the king of his dignity.

(*n*) This is ſaid by lord *Coke*, *P. C.* 14. and in *Sidney*'s caſe, *State Tr. Vol.* III. *p.* 733. it is ſaid *ſcribere eſt agere*; *quære tamen*, for if our author argues rightly, that words were not treaſon by 25 *E.* 3. becauſe there needed new acts to make them ſo in particular caſes afterwards, the ſame argument holds good with reſpect to writing, eſpecially if not publiſhed; for there were alſo new acts to make that treaſon.

So much of this act, as concerns any thing in derogation of the papal ſupremacy, is repeald by the ſtatute of 1 & 2 *Ph. & M. cap.* 8. And ſo much, as concerns treaſon, farther than it ſtands ſettled by 25 *E.* 3. is repeald by the ſtatute of 1 *Mar. cap.* 1. *Seſſ.* 1. But the reſt of this act, that concerns only miſdemeanors, ſtands perpetual, as it ſeems.

By 1 & 2 *P. & M. cap.* 9. Prayers by expreſs words, that God would ſhorten the queen's days, or take her out of the way, or ſuch like malicious prayer, amounting to the ſame effect, made treaſon; but if perſon penitent upon his arraignment, no judgment to enſue (*o*); the like proviſion is made during the queen's life by 23 *Eliz. cap.* 2.

1 & 2 *P. & M. cap.* 10. Compaſſing to levy war againſt the queen, or to depoſe her or the heirs of her body, and maliciouſly, adviſedly and directly uttering ſuch compaſſing by open preaching, expreſs words or ſayings; and alſo affirming by preaching, expreſs words or ſayings, maliciouſly, adviſedly and directly, that the queen ought not to be queen of this realm, is puniſhable by loſs of goods, and chattels, whole profits of the offender's lands during life, and perpetual impriſonment; and the ſecond offenſe is made high treaſon; but if this be done by writing, printing or overt-act, then it is made high treaſon.

1 *Eliz. cap.* 5. the ſame act almoſt *verbatim* for the ſafety of queen *Elizabeth* and the heirs of her body.

By 13 *Eliz. cap.* 1. Compaſſing the death or bodily harm of the queen, or to deprive her of the imperial crown, or to levy war againſt her; and ſuch compaſſing, maliciouſly, expreſly or adviſedly uttered or declared by printing, writing, cyphering, ſpeech, words or ſayings; and alſo malicious, adviſed and direct publiſhing and declaring by expreſs words or ſayings, that ſhe ought not to be queen, that ſhe is an heretic, ſchiſmatic, tyrant, infidel or uſurper, is made high treaſon in the principal, procurers and abettors. (*p*)

(*o*) This laſt clauſe extended to ſuch only, who had been guilty during that ſeſſion of parliament, for the act had a retroſpect to the beginning of the ſeſſion.

(*p*) "The indictments and attainders "of treaſon by force of this ſtatute are "not more to be follow'd; becauſe the "ſtatute, which made them good, is "expired."

14 *Eliz. cap.* 1. Compaſſing to take, or detain, or burn the queen's caſtles, and ſuch compaſſing declared by any expreſs words, ſpeech, act, deed or writing, is made felony; but the actual taking, or with-hloding, or burning them, is made treaſon.

13 *Car.* 2. *cap.* 1. Compaſſing the death of the king or any bodily harm tending to his wounding, impriſoment or reſtraint, or to depoſe him, or to levy war againſt him, or to ſtir foreiners with force to invade the kingdom, and ſuch compaſſing declared by printing, writing, preaching or malicious and adviſed ſpeaking, is made high treaſon: publiſhing or affirming the king to be an heretic or a papiſt, or that he endeavours to bring in popery; or inciting the people by writing, printing, preaching or other ſpeaking to hatred of his majeſty or the government, diſables to hold office. (*q*)

By all which it ſeems, that regularly, 1. words of themſelves cannot make high treaſon; 2. words of themſelves are not a ſufficient overt-act within the ſtatute of 25 E. 3. to ſerve an indictment of compaſſing the king's death.

And with this agrees that notable caſe of Mr. *Pyne* in *Croke*'s reports, T. 4 *Car.* (*r*), the words of which are theſe, "*Upon* "*conſideration of the precedents of the ſtatutes of treaſon it* "*was reſolved by the ſeven judges there named, and ſo certified to* "*his majeſty, that the ſpeaking of the words there mentiond, tho* "*they were as wicked as might be, were not treaſon; for they* "*reſolved, that, unleſs it were by ſome particular ſtatute, no* "*words will be treaſon; for there is no treaſon at this day,* "(viz. 4 Car. 1.) *but by the ſtatute of* 25 E. 3. *for imagining* "*the death of the king*, &c. *and the indictment muſt be framed*

5 "*upon*

"expired." *Co. P. C. p.* 10. in the margin.

(*q*) No penalties are to be incurd by this act, unleſs the proſecution be within ſix months next after the offenſe committed. See alſo the 4 *Ann. cap.* 8. and 6 *Ann. cap.* 7. whereby it is made high treaſon to declare by writing or printing, that the queen is not lawful or rightful queen, or that any other perſon hath right to the crown otherwiſe than according to the acts of ſettlement, or that the kings or queens of this realm by authority of parliament are not able to make laws of ſufficient force and validity to bind the deſcent of the crown: perſons who declare the ſame by preaching or adviſed ſpeaking incur a *præmunire*: but no proſecution to be for words ſpoken, unleſs information be given upon oath before a juſtice of peace within three days after, and the proſecution be within three months after ſuch information.

(*r*) *Cro. Car.* 125.

" *upon one of the points in that ſtatute; and the words ſpoken* " *there can be but evidence to diſcover the corrupt heart of him,* " *that ſpake them; but of themſelves they are not treaſon, nei-* " *ther can any indictment be framed upon them.*"

Baker in his *Chronicle, p.* 229. tells us of two very hard judgments of treaſon given in the time of *E.* 4. *viz.* that of *Walter Walker*, dwelling at the ſign of the *crown* in *Cheapſide*, who told his little child, if he would be quiet, he would make him heir of the crown: the other of *Thomas Burdett* (*ſ*), who having a white buck in his park, which in his abſence was killed by *E.* 4. hunting there, wiſhed it horns and all in his belly, that counſelled the king to it; whereas in truth none counſelled him to it, but he did it of himſelf: for theſe words both theſe were attaint of high treaſon, and executed: tho *Markham chief juſtice* rather choſe to leave his place, than aſſent to this latter judgment. *Vide* indictment of treaſon for treaſonable words. *P.* 3 *H.* 4. *Rot.* 4. *&* 12. *Walton*'s caſe and *Southe*'s caſe. (*t*)

Therefore tho this be regularly true, that words alone make not treaſon or an overt-act, yet it hath theſe allays and exceptions.

(1.) That words may expound an overt-act to make good an indictment of treaſon of compaſſing the king's death, which overt-act poſſibly of itſelf may be indifferent and unapplicable to ſuch an intent; and therefore in the indictment of treaſon they may be joined with ſuch an overt-act, to make the ſame applicable and expoſitive of ſuch a compaſſing, as may plainly appear by many of the precedents there cited. (*u*)

(2.) That ſome words, that are expreſly menacing the death or deſtruction of the king, are a ſufficient overt-act to prove that

(*ſ*) See *Rapin*'s hiſtory *ſub anno* 1478. who mentions it in the ſame manner; but it appears from the indictment in *Cro. Car.* 120. that he was indicted for calculating the king's and prince's nativity, and declaring that they would not live long; and alſo for publiſhing ſeditious rhimes and ballads, altho this was not treaſon, and was therefore made felony during queen *Elizabeth*'s life, by 23 *Eliz. cap.* 2. *Co. P. C. p.* 6.

(*t*) *Louth*'s (not *South*'s) and *Walton*'s caſe are *Trin.* 3 *H.* 4. *coram rege rot.* 4. and *P.* 3 *H.* 4. *coram rege rot.* 12. in *Sherbauck*'s caſe, who was alſo convicted of treaſon for ſcandalous words.

(*u*) In *Pyne*'s caſe.

that compaſſing of his death, *M.* 9 *Car. B. R. Crohagan*'s caſe in *Croke* (*x*), who being an *Iriſh* prieſt, 7 *Car.* 1. at *Lisbon* in *Portugal* uſed theſe words, "*I will kill the king* (innuendo domi-"num *Carolum* regem *Angliæ*) *if I may come unto him*," and in *Aug.* 9 *Caroli* he came into *England* for the ſame purpoſe (*y*). This was proved upon his trial by two witneſſes, and for that his traitrous intent and the imagination of his heart was declared by theſe words, it was held high treaſon by the courſe of the common law, and within the expreſs words of the ſtatute of 25 *E.* 3. and accordingly he was convicted, and had judgment of high treaſon; yet it is obſervable, that there was ſomewhat of an overt-act joined with it, namely his coming into *England*, whereby it ſeems to be within the former conſideration, namely, tho the coming into *England* was an act indifferent in itſelf, as to the point of treaſon; yet it being laid in the indictment, that he came to that purpoſe, and that in a great meaſure expounded to be ſo by his minatory words, the words coupled with the act of coming over make his coming over to be probably for that purpoſe, and accordingly applicable to that end.

To ſay that the king is a baſtard, or that he hath no title to the crown, is held high treaſon. *M.* 5 *Jac. Yelvert.* 197. *Blanchflower*'s caſe, *& ibidem Hill.* 8 *Jac. Berisford*'s caſe. (*z*)

P. 13 *Jac. B. R.* (*a*) *John Owen* alias *Collins* was indicted of treaſon, for that he, intending the king's death, *falſo & malitioſo*

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(*x*) *Cro. Car.* 332.

(*y*) This caſe does by no means prove, that words alone are a ſufficient overt-act, for here were not only threatning words, but alſo an act done in order to put that threatning in execution; ſo that, as our author admits, it comes more properly under the former head; the reſolution therefore in *Kelyng* 13. that words are an overt-act, which is founded on this caſe, muſt fall to the ground.

(*z*) This caſe is likewiſe reported *Cro. Jac.* 275. and 1 *Bulſ.* 147. but both the caſes quoted here by our author were actions for ſcandalous words, and the ſingle point in judgment before the court was, whether the words were actionable, and even as to that *Yelverton* and *Croke* in *Berisford*'s caſe differd from the other judges; ſo that none of theſe caſes prove, that bare words are an overt-act of treaſon within 25 *Ed.* 3. indeed where any one not only utters words declaring his own thoughts, but endeavours by promiſes of reward or other arguments to perſuade another to kill the king, or the like, this has been conſtrued an overt-act of treaſon, becauſe here is ſomething beſides the words, here is an attempt to draw another into the deſign, and is as much an overt-act as an agreement or a conſultation how to effect it. Lord *Stafford*'s caſe, *State Tr. Vol.* III. *p.* 208. *Charnock*'s caſe, *State Tr. Vol.* IV. *p.* 581. 2 *Salk.* 631.

(*a*) 1 *Roll. Rep.* 185.

litioſe ſpake theſe words of the king: *The king being excommunicate by the pope may be lawfully depoſed and killed by any whatſoever, which killing is not murder*; and being demanded by *Henry White*, how he durſt utter ſuch a bloody and fearful concluſion, *Owen* anſwered, *The matter is not ſo heinous, as you ſuppoſe, for the king being the leſs is concluded by the pope being the greater; and it is all one as a malefactor being convicted by a temporal judge is delivered to execution, ſo the king being convicted by the pope may be lawfully ſlaughtered by any whatſoever, for this is the execution of the ſupreme ſentence of the pope, as the other is the execution of the law*: to this indictment he pleaded not guilty; and it was ruled to be high treaſon by *Coke chief juſtice* and all the court; and being found guilty he had judgment to be hanged, drawn and quartered (*b*). And here it was ſaid by the king's attorney (*c*) upon the evidence, and not denied by the court, 1. that the ſtatute of 25 *E.* 3. as to compaſſing the king's death was but an affirmance of the common law. 2. That it is treaſon by the laws of all nations; and therefore an embaſſador for compaſſing the king's death ſhall be executed here for treaſon; but for other treaſons ſhall be remitted into his own country to be tried. 3. That words of this nature ſpoken *de futuro* have been adjudged high treaſon preſently; and therefore it was there ſaid to be adjudged in the time of *H.* 8. in the caſe of the duke of *Bucks*, that theſe words were high treaſon, *If the king ſhould arreſt him of high treaſon, he would ſtab him*; (*vide* caſe *de* duke *Bucks*, 13 *H.* 8. 11. *b.* 12. *a.* where there are other words alſo (*d*);) and in the caſe of another, *If* H. 8. *will not take again queen* Catharine *as his wife, he ſhall*

(*b*) Theſe words, tho very wicked and of a miſchievous tendency, and therefore an high miſdemeanor, yet unleſs accompanied with ſome circumſtances to ſhow, that they were made uſe of in order to perſuade ſomebody to kill the king, cannot according to the reſolution in *Pyne's* caſe amount to an overt-act of high treaſon, for they are not any act at all, and beſides might be ſaid by a bigotted papiſt, in the heighth of his ignorant zeal, without intending or imagining the death of the king.

(*c*) *Bacon.*

(*d*) There was alſo ſomewhat of an overt act joined with the words; for being told by a monk, that he ſhould be king, and commanded to obtain the good will of the commonalty, he was accuſed of giving certain robes for that intent: this duke's caſe was counted hard, and his fate is lamented by the reporter.

not be king (e); and in the caſe of *Stanley*, *Temp. H.* 7. *That if* Pierce Warbeck *were the ſon of* E. 4. *he would take part with him againſt* H. 7. (f)

And note, that king *James* had been long excommunicate by the pope, and that every *Maunday Thurſday* the pope excommunicates all *Calviniſts*, *&c.* and all that have withdrawn their obedience from the pope: *Owen* was executed accordingly. *Vide la.* (g) the whole judgment and particulars and conſequence thereof.

7. Thoſe words, which being ſpoken will not make an overt-act to make good an indictment of compaſſing the king's death; yet, if they are reduced into writing by the delinquent either letters or books, and publiſhed (h), will make an overt-act in the writer to make good ſuch an indictment, if the matters contained in them *import ſuch a compaſſing* (i). Co. P. C. p. 14.

Inſtances of this kind are many in 4 *Car. Croke*, *ubi ſupra*: but I ſhall inſtance particularly only in *Williams*'s caſe, P. 17 *Jac. B. R.* (k) *Wil-*

(e) This was the caſe of *Elizabeth Barton*, the holy maid of *Kent*: the words, as related by lord *Bacon* in his hiſtory of *Henry* VII. *p.* 134. were theſe; "*That if king* Henry *the eighth* "*did not take* Catharine *his wife again*, "*he ſhould be deprived of his crown*, "*and die the death of a dog.*" She and her accomplices were attainted of treaſon by a particular act of parliament, *viz.* 25 *H.* 8. *cap.* 12. upon which lord *Coke* obſerves Co. P. C. 14. that they could not have been attainted of treaſon within 25 *E.* 3.

(f) Lord *Bacon* in his hiſtory of *Henry* VII. *p.* 134. reports, that the criminal words, for which *Stanley* was accuſed, were theſe; "*That if he was* "*ſure, that the young man* (Perkin War-"beck) *were king* Edward's *ſon, he* "*would never bear arms againſt him.*" Upon which the hiſtorian makes this obſervation; "*This caſe ſeems ſomewhat* "*an hard caſe, both in reſpect of the* "*conditional, and in reſpect of the other* "*words*, &c."——But (ſays he) "*Some* "*writers do put this out of doubt; for* "*they ſay, that* Stanley *did expreſly pro-*"*miſe to aid* Perkin, *and ſent him ſome* "*help of treaſure.*" And it appears by the record of *Stanley*'s indictment quoted in *Cro. Car. p.* 123. that he was accuſed not only of words, but of an expreſs agreement and conſpiracy to bring in *Peter Warbeck* and make him king. *Note*, That the lord *Bacon*, whoſe hiſtory is here quoted, is the attorney general mentioned in *Owen*'s caſe.

(g) 1 *Rol. Rep.* 185.

(h) In *Peachum*'s caſe quoted in *Cro. Car.* 125. an unpubliſhed writing was admitted in evidence as an overt-act of treaſon: the like in the caſe of Col. *Sidney*, *State Tr. Vol.* III. *p.* 710. but both theſe caſes were unwarrantable; as to the firſt it does not appear there was any judgment, for the book ſays it was againſt the opinion of many of the judges, and the latter was reſolved at a time of day, when the reſolution of the judges in ſuch an affair ought to be but little regarded; that judgment was accordingly reverſed by act of parliament 1 *W. & M.*

(i) As was *Twyn*'s caſe, *Kelyng* 22. for the report ſays, that the people were exhorted by that book to put the king to death. *State Tr. Vol.* II. *p.* 524.

(k) This caſe (which ſeems a very hard one) is reported 2 *Rol. Rep.* 88. and is quoted *Cro. Car.* 125.

Williams wrote a book, intitled *Balaam's Aſs* (*l*), in which there were many things reproachful and dangerous to the king, and among others, *that the king ſhould die* anno domini 1621. *and that the realm ſhould be deſtroyed, becauſe it was anti-chriſtian and the abomination of deſolation*: this book he incloſed and ſealed up in a box, and ſent it to the king (*m*); and for this he was indicted and attainted and executed for high treaſon, *vide Co. P. C.* 14. concerning words, where it is ſaid thus: "*But if the ſame be ſet down in writing by the de-*" *linquent himſelf, this is a ſufficient overt-act within this ſta-*" *tute,*" And the ſame law it is, if it be ſet down in writing by any other by his command or direction.

8. If there be an aſſembling together to conſider how they may kill the king, this aſſembling is an overt-act to make good an indictment of compaſſing the king's death. This was *Arden's* caſe (*n*), 26 *Eliz.* and accordingly it was ruled *Decem.* 14 *Caroli* at *Newgate* in the caſe of *Tonge* and other confederates. (*o*)

By my lord *Coke's* opinion *Co. P. C.* 14. "A conſpiracy to "levy war is no treaſon by the ſtatute of 25 *E.* 3. till war "be levied;" and there have been ſeveral particular and temporary acts, that make the conſpiracy to levy war treaſon, as well as compaſſing the king's death. And therefore he ſaith, "That it hath been reſolved 35 *Eliz.* that conſpiracy to levy "war againſt the king ſhall not be ſaid an overt-act, to "ſerve an indictment for the compaſſing of the king's death, "becauſe the clauſes concerning compaſſing of the king's "death, and that of levying war, are diſtinct clauſes, and "declare diſtinct treaſons; and therefore the latter ſhall not "be an overt-act to ſerve the former, becauſe this were to "confound ſeveral claſſes or *membra dividentia* of high "treaſon."

And

(*l*) He wrote two books, one called *Balaam's Aſs*, and the other *Speculum Regale*.

(*m*) In this caſe was firſt broached that famous doctrine, *ſcribere eſt agere*. The court went ſo far as to declare it to be their opinion, that if this book had been found in his ſtudy, it would have been a ſufficient evidence of the treaſon, for which he was indicted; but this caſe deſtroys its own authority by going too far, for they agreed it to be a clear point, that bare words might amount to treaſon; ſtrange conſtruction of the ſtatute of 25 *Ed.* 3.

(*n*) *Anderſon, pars* I. *f.* 104.

(*o*) *Kelyng* 17. *State Tr. Vol.* II. *f.* 474.

And yet in the ſame book *p.* 12. the caſe of the earls of *Eſſex* and *Southampton* 43 *Eliz.* are cited, which ſeem to contradict that opinion: the words are, "*That the ſaid earls intended to go* "*to the court where the queen was, and to have taken her into* "*their power, and to have removed divers of her council, and* "*for that end did aſſemble a multitude of people; this being* "*raiſed to the end aforeſaid was a ſufficient overt-act for com-* "*paſſing the death of the queen;*" which ſeems to contradict what is elſewhere by him ſaid. (*p*)

And he that ſhall read the proceeding againſt the duke of *Norfolk* ſet forth at large by *Camden Eliz. ſub anno* 1572. *p.* 170. *& ſequentibus*, will find, that not only the conſpiring with a forein prince to invade this kingdom, and ſignifying it to him by letters, is an overt-act to maintain an indictment for compaſſing the queen's death: but that the duke's purpoſe to marry the queen of *Scotland* who had formerly laid claim to the crown of *England*, and ſignifying it by letters, and all this done without the conſent of the queen of *England*, was held an overt-act to depoſe the queen of *England*, and to compaſs her death; for if the queen of *Scots* claimed the crown of *England*, he, that married her, muſt be preſumed to claim it alſo in her right, which was not conſiſtent with the ſafety of the queen of *England*, and her title to the crown; and altho this extending of treaſon (as to this point of marriage) by illation and conſequence was hard (*q*); yet the duke was convict and attaint of treaſon generally upon this indictment, tho there are likewiſe ſome other crimes charged in the indictment.

I will therefore ſet down the reſolution of the judges 1663. touching thoſe, that were aſſembled in *Yorkſhire* at *Farley Wood* (*r*), divers of whom were after indicted, and attainted of high treaſon for compaſſing the death of the king: the

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(*p*) I do not ſee how this contradicts what is ſaid by lord *Coke p.* 14. for here was an expreſs deſign to put the *perſon of the queen* under a force; nay it had proceeded farther than a deſign, for there was a multitude *actually* aſſembled for that end. *State Tr. Vol.* I. *p.* 190.

(*q*) According to lord *Coke*'s underſtanding of the ſtatute of 25 *Edw.* 3. it was not only hard but illegal, for by that ſtatute no one ought to be convicted by inferences or illations. *Co. P. C. p.* 12.

(*r*) *Kelyng* 19.

the reſolution was in theſe words, as I have tranſcribed it *verbatim* out of a *MS.* of my lord keeper *Bridgman* then chief juſtice of the *C. B.* who was preſent at the conference, *Fuit agree per les juſtices ſur conference touchant ceux, queux aſſemble eux in* Farley Wood *in* Yorkſhire 1663, *que ſur indictment pur compaſſing mort le roy overt ſais poet eſtre layd in conſulting a levyer guerre contre lui (que eſt overt-act de ſoy meſme) & actual aſſembling, & levying guerre:* Et ou Co. P. C. 14. dit, " *Qe conſpiracy a levyer guerre neſt treaſon, tan-* " *que ſoit levyed, & pur ceo neſt overt-act, ou maniſeſt proofe* " *de compaſſing mort le roy, car le parols ſont, (de ceo) i. e.* " *compaſſing mort le roy, & ceo ſoit a confounder le ſeveral* " *claſſes, ou* membra dividentia:" *Uncor le ley eſt contra; & iſſint fuit reſolve per touts les juſtices & counсel de roy in le caſe des regicides,* Venner, Tonge & Vane, (ſſ), *qe ſur indictment de compaſſing de mort le roy, conſulting a levyer guerre, ou actual aſſembling de guerre fueront evidence, & overt faits provant compaſſing mort le roy; & ceo appeirt in* Co. P. C. 14. " *Si ſubject conſpire ove forein prince de invader le* " *realm, & prepare pur ceo per overt fait, ceo eſt ſufficient* " *overt-act pur mort le roy:* Et ibidem p. 12. " *Le count de* " Eſſex & South' *intended daler al court, & daver priſe la* " *reigne en lour power, & remover aſcun de counсel, & a ceo* " *fine aſſembled multitude de people;* this being raiſed for the " end aforeſaid *fuit ſufficient overt-act pur compaſſing de mort* " *le roy,*" *queux 2 caſes ſont expreſſe contrary al primer.*

Fuit auxi agree, que ſi un overt-act ſoit lay en le enditement, & le proof eſt dun autre overt-act de meſme le kinde, ou ſpecies de treaſon, ceo eſt aſſets bone evidence.

I muſt conſeſs, that I could never aſſent to this laſt part of the reſolution, tho I know it was ſo practiſed in criminal caſes in the ſtar-chamber, for I have always thought 1. That the overt-act is an eſſential part of the indictment. 2. As it muſt be laid, ſo it muſt be proved (*t*); for otherwiſe, if another act than what is laid ſhould be ſufficient,

(ſſ) *Kelyng* 20, 21.

(*t*) *Kelyng* 8. is *contra*, however this point is put out of all doubt by 7 *W.* 3. *cap.* 3. §. 8. whereby it is provided, that no evidence ſhall be given of any overt-act, which is not expreſly laid in the indictment.

the priſoner would never be provided to make his defenſe. 3. That more overt-acts than one may be laid in an indictment, and then the proof of any of them ſo laid, being in law ſufficient overt-acts, maintains the indictment. 4. That if any overt-act be ſufficiently laid in the indictment, and proved, any other overt-acts may be given in evidence to aggravate the crime and render it more probable.

This reſolution, as to the point of compaſſing the king's death, being the latter and of great weight, and more than twice practiſed (*u*), ought to out-weigh the opinion before cited, and with this agrees the reſolution of 13 *Eliz. Dyer* 298. *b.* in Dr. *Storie*'s caſe, who conſpired with a forein prince to invade this realm; it was adjudged an overt-act to make good an indictment of compaſſing the queen's death (*x*). *Vide Anderſon*'s *Reports Placito* 154. which was the caſe of *Arden* and *Somerville* and others, who conſpired the death of queen *Elizabeth*, reſolved by all the juſtices, that a meeting together of theſe accomplices to conſult touching the manner of effecting it was an overt-act to prove it, as well as *Somerville*'s buying of a dagger actually to have executed it. *Anderſon*'s *Rep. Pars* I. *p.* 104.

And yet this difference ſeems to me agreeable to law, and reconciles in ſome meaſure both reſolutions.

An aſſembly to levy war againſt the king, either to depoſe or reſtrain, or enforce him to any act, or to come to his preſence to remove his counſellors or miniſters, or to fight againſt the king's lieutenant or military commiſſionate officers,

(*u*) But yet it does by no means follow from thence, that this reſolution is right as to this point any more than as to the other reſolved at the ſame time, which yet our author thinks to be ſtrong; were it a point of common law the repeated reſolutions of the judges is the only way to know what the law is, but where the queſtion ariſes upon an act of parliament, that is to be the rule for courts of juſtice to go by, of which they are to judge according to their own reaſon and underſtanding, and are not in ſuch caſe tied down by former determinations any farther than the reaſons or arguments thereof appear concluſive, for *judicandum eſt legibus non exemplis. Co. P. C. 6. in margine.* A bare conſpiracy to levy war is certainly not treaſon, and was ſo adjudged in the caſe of Sir *John Friend*; but if it appear upon evidence, that the deſign was to kill the king, or depoſe him or impriſon him, or put any force on him, and the levying war was only the way or method made uſe of to effect that deſign, then it will be an overt-act of compaſſing the death of the king; and this is the diſtinction taken by lord chief juſtice *Holt* in Sir *John Friend*'s caſe, *State Tr. Vol.* IV. *p.* 613, 614.

(*x*) See 2 *Vent.* 313.

ters, is an overt-act proving the compaſſing of the death of the king; for ſuch a war is directed againſt the very perſon of the king, and he, that deſigns to fight againſt the king, cannot but know at leaſt it muſt hazard his life; ſuch was the caſe of the earl of *Eſſex* and ſome others.

But if it be a levying of a war againſt the king merely by interpretation and conſtruction of law, as that of *Burton* (*y*), and others to pull down all encloſures, and that of the apprentices in *London* lately, to pull down all bawdy-houſes (*z*), *de quibus infra*, this ſeems not to be an evidence of an overt-act to prove compaſſing the king's death, when it is ſo diſcloſed upon the proof, or if it be ſo particularly laid in the indictment; tho *prima facie* if it be barely laid as a levying war againſt the king in the indictment, it is a good overt-act to ſerve an indictment of compaſſing the king's death, till upon evidence it ſhall be diſcloſed to be only to the purpoſe aforeſaid, and ſo only an interpretative or conſtructive levying of war. And *Burton*'s caſe 39 *Eliz.* ſeems to intimate as much, becauſe they took him to be indictable only upon the ſtatute of 13 *Eliz. cap.* 1. for conſpiring to levy war againſt the queen, whereas if this had been an overt-act to prove the compaſſing of the death of the king, the fact had been treaſon within 25 *E.* 3. as ſurely it would have been, if he had conſpired to have raiſed a war directly againſt the king or his forces, and aſſembled people for that purpoſe, tho no actual war had been cauſed by him.

But ſuch a levying of war may in proceſs of time riſe into a direct war againſt the king; as if the king ſend his forces to ſuppreſs them, and they fight the king's forces; and then it may be an overt-act to prove the compaſſing of the king's death.

And thus far of compaſſing the *king*'s death.

Something I ſhall add touching the compaſſing of the death of the *queen*, or *prince*, wherein I ſhall firſt conſider, what ſhall be ſaid *the queen*, or *their eldeſt ſon* within this act. 2. What a compaſſing of their death.

1. A

(*y*) *Ca. P. C.* 10. (*z*) *Kel.* 70.

I. A queen dowager, namely the queen after the death of her huſband, is not a queen within this act, for tho ſhe bear the title of queen, and hath many prerogatives anſwering the dignity of her perſon, yet ſhe is not (*his queen*) or, as the other parts of the act expreſs it, (*his companion*) it muſt be the queen conſort, the king's wife, and during the marriage between them.

2. The queen divorced from the king *a vinculo matrimonii*, as for cauſe of conſanguinity, is not a queen within this act, tho the king be living: this was the caſe of queen *Katharine*, who was firſt married to prince *Arthur*, and by him, as was ſaid, carnally known, and after his death married to prince *Henry*, (afterward king *Henry* VIII.) by whom ſhe had iſſue *Mary*, (afterward queen of *England*) and afterwards after twenty years marriage was divorced *cauſâ affinitatis*, which divorce was confirmed in the parliament 25 *H.* 8. *cap.* 22.

This was alſo the caſe of his ſecond wife queen *Anne*, who was alſo divorced *a vinculo*, and that divorce confirmed by the ſtatute of 28 *H.* 8. *cap.* 7. which nevertheleſs was again repeald in part by the ſtatute of 35 *H.* 8. *cap.* 1. and in effect wholly by the ſtatute of 1 *Eliz. cap.* 3. and yet there is one clauſe obſervable in the act of 28 *H.* 8. that treaſons committed againſt queen *Anne*, or the lady *Elizabeth* her daughter, meſne between the marriage and that divorce were puniſhable, altho the divorce made a nullity of the marriage; and therefore there is a ſpecial clauſe to pardon all ſuch treaſons, ſo that the relation of the divorce, and ſeparation to diſſolve the marriage *ab initio*, was not thought ſufficient to diſcharge thoſe treaſons, without a ſpecial pardon diſcharging the treaſons committed againſt them.

But we need not put the caſe of a divorce *a menſâ & thoro cauſâ adulterii*, becauſe adultety by the king's wife is high treaſon in her, and ſo the caſe of a divorce cannot well come in queſtion, for ſhe muſt be executed for treaſon. *P.* 28 *H.* 8. *Spilman's Rep.* (*a*). 33 *H.* 8. *cap.* 21. (*b*). *Co. P. C. p.* 9.

5 *Ou*

(*a*) In the caſe of queen *Anne Bolen.* (*b*) In the caſe of queen *Katharine Howard.*

II. *Ou lour fitz eigne & heir.*

At common law compaſſing the death of any of the king's children, and declaring it by overt-act was taken to be treaſon, *Briton, ubi ſupra*; but by this act it is reſtrained to *the eldeſt ſon and heir.*

1. *The eldeſt ſon and heir* extends not to a collateral heir, tho declared heir apparent to the crown, unleſs there be a ſpecial proviſion for that purpoſe by act of parliament: thus *Roger Mortimer* 11 *R.* 2. *Richard* duke of *York* 39 *H.* 6. *John de la Poole tempore R.* 3. and *Henry* marquis of *Exeter tempore H.* 8. were declared heirs apparent of the crown; yet compaſſing any of their deaths in the king's life-time was not treaſon within this act. *Co. P. C.* 8, 9.

And therefore in that great agreement made in the parliament of 39 *H.* 6. when *Richard* duke of *York* made his claim to the crown, and it was enacted, that *H.* 6. ſhould hold the crown during his life, and that *Richard* duke of *York* ſhould ſucceed him, *Rot. Parl.* 39 *H.* 6. *n.* 24. it is ſpecially enacted, that if any perſon do compaſs or imagine the death of the duke, and thereof be attaint by open act, it ſhall be high treaſon; which had not been ſo, unleſs it had been ſpecially enacted.

2. The king takes wife, and by her hath iſſue two ſons, the eldeſt dies, the wife dies, he takes a ſecond wife; this ſecond ſon, tho he were once not eldeſt, and tho he be not *lour eigne fitz*, but only the king's ſon, is eldeſt ſon within this ſtatute.

3. King *Edward* III. had iſſue the *Black Prince*, who had iſſue *Richard* of *Burdeaux* afterwards king *Richard* II. his eldeſt grandchild, tho he were not, in the life of his father the *Black Prince*, the king's eldeſt ſon within this ſtatute, yet his father being dead in the life of *Edward* III. it may be very conſiderable whether prince *Richard* be the king's eldeſt ſon within this ſtatute, and the compaſſing of his death be high treaſon; for he is heir apparent of the crown, and his heirſhip cannot be deveſted by any after-born child.

The duchy of *Cornwall* was ſettled upon the *Black Prince* & *ipſius & hæredum ſuorum regum Angliæ filiis primogenitis*,

altho the king's eldeſt daughter be not dutcheſs of *Cornwall*, becauſe not *filius*, yet, (contrary to the opinion delivered in the prince's caſe 8 *Co. Rep.* 30. *a.*) *H.* 8. after the death of his brother prince *Arthur*, and our late king *Charles*, after the death of his eldeſt brother prince *Henry*, were dukes of *Cornwall* in the life of their fathers: the latter appears expreſly by the ſtatute of 21 *Jac. cap.* 29. wherein it is ſo declared by judgment of parliament; and *Richard* of *Burdeaux* was alſo duke of *Cornwall* after the death of his father the *Black Prince*, and comes in the catalogue of dukes of *Cornwall* in the collection of *Vincent* and *Mills* of the nobility of *England*; and had the revenues thereunto belonging, as appears undeniably. *Rot. Parl.* 51 *E.* 3. *n.* 65.

But it ſeems it was not by virtue of that limitation in the grant to the *Black Prince*, but by a new ſpecial creation; for *Rot. Parl.* 50 *E.* 3. *n.* 50. the commons petition, that he might be created duke of *Cornwall*, earl of *Cheſter*, and prince of *Wales*; the king declined the doing of it at their requeſt, as being a thing proper only for the king to do his pleaſure therein: the truth is, the king had done it before the requeſt made, *viz. Rot. Cart.* 47, 48 & 49 *E.* 3. *n.* 10. the words of the charter are, "*Ex conſilio & conſenſu prælatorum, ducum,* "*comitum & baronum, ipſum* Ricardum *principem* Walliæ, *du-*"*cem* Cornubiæ, *& comitem* Ceſtriæ *fecimus & creavimus*", and grants him the poſſeſſions thereunto belonging, which he accordingly enjoyed: *vide Rot. Parl.* 51 *E.* 3. *n.* 9. and obſerve a certain eſtate is limited by the patent of creation for life; or otherwiſe, it ſeems, it was thought fit to leave it to the conſtruction of law, whether he had it purely by new creation, or by the conſtruction of the charter 11 *E.* 2. to the *Black Prince*.

This caſe therefore touching conſpiring the death of ſuch a prince, as *Richard* of *Burdeaux* then was, tho it may be probable to be treaſon within the intent of this act, is fitteſt to be firſt decided by parliament according to the caution uſed in the ſtatute of 25 *E.* 3.

3. If the king of *England* hath two daughters only, and no ſon, the eldeſt daughter is not within the words or intent

of the *king's eldeſt ſon* within this clauſe, for a ſon may be after born; but ſeveral ſtatutes have made temporary proviſions in this caſe: *vide* the ſtatutes of 25 *H.* 8. *cap.* 22. 28 *H.* 8. *cap.* 7.

It is true the implication of *Co. P. C. p.* 9. where it is ſaid, "*If the heir apparent be collateral heir apparent, he is not* "*within this ſtatute, until it be declared by parliament,*" implies that the lineal heir, male or female, is within this ſtatute.

But the implication of the ſtatute itſelf is againſt it, becauſe this act almoſt in the ſame breath takes notice of the king's eldeſt daughter upon another rank of treaſon, namely defiling her; and it is not ſafe to extend this act by conſtruction.

The ſecond daughter, living the firſt, is certainly not within this law, becauſe not immediately inheritable to the crown.

Yet by the ſtatute of 25 *H.* 8. *cap.* 22. which was but temporary, proviſion is made, that if any thing ſhould be written or done to the peril, ſlander or diſheriſon of any of the Iſſues and heirs between him and queen *Anne*, the ſame ſhould be treaſon.

Thus far touching the perſons of the queen or prince.

Now what ſhall be ſaid a compaſſing of their death, or an overt-act to prove the ſame: what ſhall be ſaid a compaſſing of the king's death, hath been at large declared, much whereof may be applied to the queen or prince, but not univerſally; for the king is above the coercion of the law, tho his actions are not exempted from the direction of the law in many caſes; but the queen and prince are ſubjects of the king, and ſubjects to the laws; whence it comes to paſs, that there are certain overt-acts manifeſting compaſſing the king's death, which are ſpecifical and appropriate to the king and his ſovereign power and royal dignity, which are not applicable to the queen or prince.

If a man compaſs to impriſon the king, tho it be colourably done by proceſs of law, it is a compaſſing of the king's death within this act, as hath been ſhewn.

But if the queen or prince commit a miſdemeanor of ſuch a nature, as is a contempt againſt the king's laws, to which impri-

impriſonment is proper, as in caſe of treaſon, felony, reſcue, they may be impriſoned by proceſs of law without danger of treaſon: thus was the ſon of *Henry* IV. committed by *Gaſcoign* chief juſtice for reſcuing a priſoner from the bar; and ſeveral acts of attainder of treaſon have paſſed in parliament againſt ſome queen-conſorts, as appears by 28 *H.* 8. *cap.* 7. 33 *H.* 8. *cap.* 21. againſt queen *Catharine Howard*. *Rot. Parl.* 5 *H.* 5. *n.* 11.

Again, to compaſs to depoſe the king is treaſon, but to compaſs a divorce between the king and queen by the king's commiſſion by due proceſs of law was no treaſon, as appears in the proceſs before the archbiſhop of *Canterbury*, whereupon queen *Catharine*, and afterwards queen *Anne* were divorced.

The compaſſing therefore of the death of the queen or prince, which is treaſon within this act, is where a man without due proceſs of law expreſly compaſſeth the wounding or death of them either by force or poiſon.

And thus much for treaſon in compaſſing the death of the king, queen, or prince; and becauſe the next treaſon declared, namely the violation of the king's wife, the king's eldeſt ſon's wife, the king's eldeſt daughter, hath not much to be ſaid concerning it, I ſhall cloſe this chapter with it.

1. *The violating the king's companion*, that is the king's wife, the queen conſort, her huſband being now living; this is high treaſon, and ſo it is in her if ſhe conſent. P. 28 *H.* 8. 33 *H.* 8. *cap.* 21. *Co. P. C. p.* 9.

2. *The wife of the king's eldeſt ſon and heir*, a princeſs conſort, and during the coverture between them; and if ſhe conſent, it is treaſon in her.

3. *The king's eldeſt daughter not married*: this extends to a ſecond daughter, the eldeſt being dead; for ſhe is now eldeſt, and, for want of iſſue male, inheritable to the crown; but at common law this treaſon extended to any of the daughters. *Briton, cap.* 22. §. 71. It extends to an eldeſt daughter, tho there be ſons; and *quære*, whether to an eldeſt daughter, that hath been married, and is now a widow, *nient marry* may be conſtrued either way; or if it doth, yet whether it extends

extends to an eldeſt daughter, that is a widow, and hath children by her huſband; the words of the old books are *avant ceo, qel eſt marry*: it ſeems, that if the eldeſt daughter hath been once married, ſhe is not within this law, becauſe of the words *nient marry*, tho the reaſon may poſſibly be the ſame; and it ſeems, tho there be ſons, yet the violating of the king's eldeſt daughter, being within the expreſs words of the law, the violation of her is within this law, becauſe within the words; and yet the violation of the wife of the king's ſecond ſon is not within this ſtatute, yet he and his iſſue is inheritable to the crown before the eldeſt daughter; in this caſe therefore the words of the law are to govern.

Altho it ſhould ſeem probable, that the eldeſt ſon of the prince after the death of his father may be the king's eldeſt ſon within this act, as is before obſerved; yet the daughter of the king's eldeſt daughter, after her mother's death, ſeems not an eldeſt daughter within this act, her grandfather being living, for the grandſon, who is heir apparent of the crown, is of more conſideration than the daughter of a daughter, who cannot be heir apparent, becauſe a ſon may be born.

Quære, whether violating the eldeſt daughter, after the death of the king her father, be treaſon within this act, where a ſon ſucceeds to the crown: it ſeems not, for the relation is ceaſed. (*c*)

And thus far for the two firſt branches of high treaſon.

(*c*) She is no longer *leigne fils le roy*. It having been before obſerved that a queen regent is a king within this act, it follows of courſe that the eldeſt ſon and the eldeſt daughter of ſuch a queen is likewiſe within it. *Co. P. C. p.* 8.

CHAP. XIV.

Concerning levying of war *againſt the king.*

THE *jus gladii*, both military and civil, is one of the *jura majeſtatis*, and therefore no man can levy war within this kingdom without the king's commiſſion. *Co. P. C. p.* 9. See the ſtatute, or rather proclamation (*a*) *de defenſione portandi arma*, wherein it is recited by the king, that the prelates, earls, barons, and commonalty *illoeque aſembles en aviſement ſur ceſt beſoigne nous eiont dit, que a nous appent & de nous par noſtre royal ſeignorie defendre fortment des armes, & de tout autre force contre noſtre pees, a touts les foitz, que nous plerra* (*b*); and hence it is in all declarations and indictments touching things done againſt the peace, the concluſion goes *contra pacem domini regis.*

It is true, there have been great diſputes in this kingdom touching the diſpoſition of the *militia* of this kingdom, which are now all ſettled, and declared to be the right of the crown by the ſtatutes of 13 *Car.* 2. *cap.* 6. and 13 & 14 *Car.* 2. *cap.* 3.

Now as to this clauſe of high treaſon, *Ou ſi home levy guerre countre noſtre ſeigneur le roy en ſon realme.*

To make a treaſon within this clauſe of this ſtatute there muſt be three things concurring.

I. It muſt be a *levying of war.*

II. It muſt be a levying of war *againſt the king.*

III. It muſt be a levying of war againſt the king *in his realm.*

I. For the firſt of theſe, the act ſaith *levy guerre*; what ſhall be ſaid a levying of war, is in truth a queſtion of fact,

2 and

(*a*) In the ſeventh year of *Edward* I.

(*b*) This ſtatute is only a proof of the king's power to iſſue his proclamation againſt coming armed to the parliament. *Vide Rot. Parl.* 25 *E.* 3. *pars.* 1. *n.* 58. *dorſo.*

and requires many circumſtances to give it that denomination, which may be difficult to enumerate or to define; and commonly is expreſſed by the words *more guerrino arraiati.* Fost. C. L. 208.

As where people are aſſembled in great numbers armed with weapons offenſive, or weapons of war, if they march thus armed in a body, if they have choſen commanders or officers, if they march *cum vexillis explicatis* or with drums or trumpets, and the like; whether the greatneſs of their numbers, and their continuance together doing theſe acts may not amount to *more guerrino arraiati*, may be conſiderable.

But a bare conſpiracy or conſultations of perſons to levy a war, and to provide weapons for that purpoſe; this, tho it may in ſome caſes amount to an overt-act of compaſſing the king's death, yet it is not a levying of war within this clauſe of this ſtatute; and therefore there have been many temporary acts of parliament to make ſuch a conſpiracy to levy war treaſon during the life of the prince, as 13 *Eliz. cap.* 1. 13 *Car.* 2. *cap.* 1. and others. *Vide accordant Co. P. C. p.* 10.

Again, the actual aſſembling of many rioters in great numbers to do unlawful acts if it be not *modo guerrino* or *in ſpecie belli*, as if they have no military arms, nor march or continue together in the poſture of war, may make a great riot, yet doth not always amount to a levying of war: *vide* ſtatute 3 & 4 *E.* 6. *cap.* 5. 1 *Mar. cap.* 12. (*c*)

II. As to the ſecond; the ſtatute ſaith, (*againſt us*) to make it therefore treaſon, it muſt be a levying of war againſt the king; otherwiſe, tho it be *more guerrino*, and a levying of war, it is not treaſon. 1. Therefore if it be upon a private quarrel, as many times it happend between lords marchers, tho it be *vexillis explicatis*, it ſeems no levying of war againſt the king. 2. If it be only upon a private and particular deſign, as to pull down the incloſures of ſuch a particular common, it is no levying of war againſt the king. *Co. P. C. p.* 9. 3. But a war levied againſt the king is of two ſorts, 1. Expreſly and directly, as raiſing war againſt the king or his general and forces, or to ſurpriſe or injure the king's perſon, or

(*c*) See alſo 1 *Geo.* 1. *cap.* 5.

or to impriſon him, or to go to his preſence to enforce him to remove any of his miniſters or counſellors, and the like. 2. Interpretatively and conſtructively, as when a war is levied to throw down incloſures generally, or to inhanſe ſervants wages, or to alter religion eſtabliſhed by law; and many inſtances of like nature might be given; this hath been reſolved to be a war againſt the king, and treaſon within this clauſe; and the conſpiring to levy ſuch a war is treaſon, tho not within the act of 25 *E.* 3. yet by divers temporary acts of parliament, as 13 *Eliz.* during the queen's life, 13 *Car.* 2. during our king's life. *Co. P. C. p.* 10.

The firſt reſolution, that I find of this interpretative levying of war, is a reſolution cited by my lord *Coke, P. C. p.* 10. in the time of *Henry* VIII. for inhanſing ſervants wages; and the next in time was that of *Burton*, 39 *Eliz. Co. P. C. p.* 10. (*d*) for raiſing an armed force to pull down incloſures generally: this is now ſettled by theſe inſtances, and ſome of the like kind hereafter mentiond; the proceeding againſt *Burton* and his companions was not upon the ſtatute of 25 *E.* 3. which required, that in new caſes the parliament ſhould be firſt conſulted; but upon the ſtatute of 13 *Eliz.* for conſpiring to levy war, which hath not that clauſe of conſulting the parliament in new caſes, and therefore ſeems to leave a latitude to the judges to make conſtruction greater, than that was left by the ſtatute of 25 *E.* 3.

Theſe reſolutions being made and ſettled we muſt acquieſce in them; but in my opinion, if new caſes happen for the future, that have not an expreſs reſolution in point, nor are expreſly within the words of 25 *E.* 3. tho they may ſeem to have a parity of reaſon, it is the ſafeſt way, and moſt agreeable to the wiſdom of the great act of 25 *E.* 3. firſt to conſult the parliament and have their declaration, and to be very wary in multiplying conſtructive and interpretative treaſons, for we know not where it will end.

But particular inſtances will beſt illuſtrate this whole learning, which I ſhall ſubjoin, tho ſomewhat promiſcuouſly, as they occur to my memory.

2 A con-

(*d*) *Poph.* 122.

A conſpiring or compaſſing to levy war is not a levying war within this act, unleſs the war be levied; this appears *Co. P. C. p.* 9. and alſo by thoſe many acts of parliament above-mentiond, which were but temporary and limited to continue during the life of the king or queen, whereby it is ſpecially enacted, that ſuch compaſſing to levy war ſhall be treaſon; which needed not have been, if it had been treaſon by the ſtatute of 25 *E.* 3. *Vide* 1 *&* 2 *P. & M. cap.* 10. 1 *Eliz. cap.* 5. 13 *Eliz. cap.* 1. 13 *Car.* 2. *cap.* 1.

And therefore in the caſe of *Robert Burton* and others, that conſpired to aſſemble themſelves and pull down incloſures, and to gain arms at the lord *Norris*'s houſe, and to arm themſelves for that purpoſe. *Co. P. C.* 10. they were indicted and attainted purely upon the ſtatute of 13 *Eliz. cap.* 1. whereby conſpiring to levy war is made treaſon.

But if divers conſpire to levy war, and ſome of them actually levy it, this is high treaſon in all the conſpirators, becauſe in treaſon all are principals, and here is a war levied. (*e*)

If divers perſons levy a force of multitude of men to pull down a particular incloſure, this is not a levying of war within this ſtatute, but a great riot; but if they levy war to pull down all incloſures, or to expulſe ſtrangers, or to remove counſellors, or againſt any ſtatute, as namely the ſtatute of *Labourers*, or for inhanſing ſalaries and wages, this is a levying war againſt the king, becauſe it is generally againſt the king's laws, and the offenders take upon them the reformation, which ſubjects by gathering power ought not to do. *Co. P. C. p.* 9, 10. *Vide* the act 3 *&* 4 *E.* 6. *cap.* 5. "If any "to the number of twelve ſhall intend, go about, practiſe "or put in ure by force to alter the religion eſtabliſhed by "law, or any other laws, and depart not within an hour af"ter proclamation, or after that ſhall wilfully in a forcible "manner attempt to put in ure the things above ſpecified, "then it is high treaſon."

If men levy war to break priſons to deliver one or more particular perſons out of priſon, wherein they are lawfully

 impriſoned,

(*e*) *Co. P. C. p.* 9. *Kelyng. p.* 19.

imprisoned, unless such as are imprisoned for treason; this upon advice of the judges upon a special verdict found at the *Old Bailey* was ruled not to be high treason, but only a great riot 1668. but if it were to break prisons, or deliver persons generally out of prison, this is treason *Co. P. C. p. 9.*

There was a special verdict found at the *Old Bailey anno* 20 *Car.* II. (*f*), that *A. B.* and *C.* with divers persons to the number of an hundred assembled themselves *modo guerrino* to pull down bawdy-houses, and that they marched with a flag upon a staff and weapons, and pulled down certain houses in prosecution of their conspiracy; this by all the judges assembled, except one (*g*), was ruled to be levying of war, and so high treason within this statute; and accordingly they were executed.

But the reason that made the doubt to him that doubted it, was 1. Because it seemed but an unruly company of apprentices, among whom that custom of pulling down bawdy-houses had long obtaind, and therefore was usually repressed by officers, and not punished as traitors. 2. Because the finding to pull down bawdy-houses, might reasonably be intended two or three particular bawdy-houses, and the indefinite expression should not *in materiâ odiosâ* be construed either universally or generally. And 3. Because the statute of 1 *Mar. cap.* 12. tho now discontinued, makes assemblies of above twelve persons and of as high a nature only felony, and that not without a continuance together an hour after proclamation made; as namely an assembly to pull down bawdy-houses, burn mills or bays, or to abate the rents of any manors, lands or tenements, or the price of victuals, corn or grain; or if any person shall ring a bell, beat a drum or sound a trumpet, and thereby raise above the number of twelve for the purposes aforesaid, which are raised accordingly and do the fact, and dissolve not within an hour after proclamation, or that shall convey money, harness, artillery, it is enacted to be felony; and if any above the number of two, and under twelve, do practise with force of arms unlawfully, and of their own authority to kill any of the queen's

(*f*) *Vide Kelyng p.* 70, &c. (*g*) This was our author himself. *Vide Kelyng* 73.

queen's subjects, to dig up pales, throw down inclosures of parks, pull down any house, mill, or burn any stack of corn, or abate rents of manors, lands or tenements, or price of corn or victual, and do not depart within an hour after proclamation, and continue to attempt to do or put in ure any of the things above-mentioned, they are to have a year's imprisonment.

And the statute of 3 & 4 *E.* 6. *cap.* 5. is to the same purpose, only if the number of forty, or above, come together to do such acts as before, or any other felonious, rebellious or traiterous acts, and continue together two hours, it is made high treason. (*b*)

But yet the greater opinion obtaind, as it was fit; and these apprentices had judgment, and some of them were executed as for high treason.

Yet this use may be made of those statutes: 1. That there may be several riots of a great and notorious nature, which yet amount not to high treason. 2. But again, those acts and attempts possibly might not be general, but might be directed only to some particular instances, as for the purpose, not to pull down all houses or mills, but some special ones, which they thought offensive to them; nor to abate the rents of all manors, but of some particular manor, whereof they were tenants; nor to make a general abatement of the prices of victuals or corn, but in some particular market, or within some precinct; and so crosseth not the general learning before given of constructive treason. 3. It seems by that act also, they did not take the bare assembly to that intent to be a sufficient overt-act of levying of war; that was but an attempt and putting in ure, unless they had actually begun the execution of that intention, going about, practising or putting in ure; for this act puts a difference between the same and the doing thereof.

In the parliament of 20 *E.* 1. now printed in Mr. *Ryley*, p. 77. it appears there arose a private quarrel between the earls of *Gloucester* and *Hereford*, two great lords marchers; and hereupon divers of the earl of *Gloucester*'s party with his consent *cum multitu-*

(*b*) See also 1 *Geo.* 1. *cap.* 5.

multitudine tam equitum quam peditum exierunt de terra ipſius comitis de Morgannon *cum vexillo de armis ipſius comitis explicato verſus terram comitis* Heref' *de* Brecknock, *& ingreſſi fuerunt terram illam per ſpatium duarum leucarum, & illam depredati fuerunt, & bona illa depredata uſque in terram dicti comitis* Gloceſtriæ *adduxerunt*, and killed many, and burnt houſes and committed divers outrages; and the like was done by the earl of *Hereford* and his party upon the earl of *Glouceſter*: they endeavoured to excuſe themſelves by certain cuſtoms between the lords marchers; by the judgment of the lords in parliament their royal franchiſes were ſeiſed as forfeited during their lives, and they committed to priſon, till ranſomed at the king's pleaſure.

Altho here was really a war levied between theſe two earls, yet in as much as it was upon a private quarrel between them, it was only a great riot and contempt, and no levying of war againſt the king; and ſo neither at common law, nor within the ſtatute of 25 E. 3. if it had been then made, was it high treaſon.

It appears by *Walſingham ſub anno* 1403. a great rebellion was raiſed againſt *Henry* IV. by *Henry Percy* ſon of the earl of *Northumberland* and others: the earl gathered a great force, and actually took part with neither, but marched with his force, as ſome thought, towards his ſon, and, as others thought, towards the king *pro redintegrando pacis negotio*; he was hindred in his march by the earl of *Weſtmoreland* and returned to his houſe at *Werkworth*; the king had the victory; the earl petitioned the king; the whole fact was examined in parliament, *Rot. Parl.* 5 *H.* 4. *n.* 12. The king demanded the opinion of the judges and his counſel touching it: the lords proteſt the judgment belongs in this caſe to them; the lords by the king's command take the buſineſs into examination, and upon view of the ſtatute of 25 E. 3. and the ſtatute of Liveries "*Adjugerent, qe ceo, qe fuit fait par le counte, neſt* "*pas treaſon, ne felony, mes treſpaſs tantſolement, pur quel treſ-*"*paſs le dit counte deuſt faire fine & ranſom a volunte du roy*;" but *Henry* the ſon was attaint of treaſon.

It appears not what the reaſon of that judgment was, whether they thought it only a compaſſing to levy war, and no war actually levied by him, becauſe not actually joined with his ſon; or whether they thought his intention was only to come to the king to mediate peace, and not to levy a war, nor to do him any bodily harm; that it was indeed an offenſe in him to raiſe an army without the king's commiſſion, but not an offenſe of high treaſon, becauſe it did not appear that he raiſed arms to oppoſe the king, but poſſibly to aſſiſt him; but whatever was the reaſon of it, it was a very mild and gentle judgment, for the earl was doubtful of a more ſevere judgment: *nota*, he returns thanks to the lords and commons *de lour bone & entyre coers a lui monſtre*, and thanks the king for his grace.

The clauſe in the ſtatute of 25 *E.* 3. *If any man ride armed covertly or ſecretly with men of arms againſt any other to ſlay, rob, or take him, or to detain him, till he hath made fine or ranſom, or have his deliverance, it is not in the mind of the king or his council, that in ſuch caſe it ſhall be judged treaſon, but ſhall be judged felony or treſpaſs according to the laws of the land of old times uſed, and according as the caſe requireth; and if in ſuch caſe or other like (i) before this time any judges have judged treaſon, and for this cauſe the lands and tenements have come to the king's hands as forfeited, the chief lords of the fee ſhall have the eſcheat.*

This declares the law, that a riding armed with men of arms upon a private quarrel or deſign againſt a common perſon is not a levying of war againſt the king (*k*); and the eſpecial reaſon of the expreſs adding of this clauſe ſeems to

(*i*) *Vide ſimile H.* 26. *E.* 3. *coram rege, Rot.* 30. *Rex.* Hale.

This caſe was in the county of *Eſſex*, and was no more than this; Sir *John Fitzwauter* and *William Daltrip* his ſteward, *&c.* were preſented by juries of divers hundreds for taking men by force, and detaining them till they paid fines for their ranſom, for exacting and extorting money from others, and for ſeveral great and enormous riots, miſdemeanors and treſpaſſes in the county of *Eſſex*, *attractando ſibi regalem poteſtatem*, upon which Sir *John Fitzwauter* ſurrendered himſelf, and was committed to the *Tower* of *London*, and *Daltrip* was outlawed, who afterwards pleaded the king's pardon *pro feloniis, conſpirationibus, manutenentia & tranſgreſſionibus prædictis, necnon pro utlagariis occaſione præmiſſorum in ipſum procuratis*, upon which he was diſcharged *ſine die*.

(*k*) *Co. P. C. p.* 10.

be in reſpect of that judgment of treaſon given againſt Sir *John Gerberge, Trin.* 21 *E.* 3. *Rot.* 23. *Rex.* and at large before mentiond, *chap.* 11. which judgment is in effect repeald by this act.

It appears by Sir *F. Moore*'s *Rep. n.* 849. (*l*), the earl of *Eſſex* was arraigned and condemned for high treaſon before the lord high ſteward, whereupon it was reſolved by the juſtices, 1. That when the queen ſent the lord keeper of the great ſeal (*m*) to him, commanding him to diſmiſs the armed perſons in his houſe and to come to her, and he refuſed to come, and continued the arms and armed perſons in his houſe, that was treaſon. 2. That when he went with a troop of captains and others from his houſe into the city of *London*, and there prayed aid of the citizens in defenſe of his life, and to go with him to the queen's court to bring him into the queen's preſence with a ſtrong hand, ſo that he might be powerful enough to remove certain of his enemies, that were attendant on the queen, this was high treaſon, becauſe it tends to a force to be done upon the queen, and a reſtraint of her in her houſe; and the fact in *London* was actual rebellion, tho he intended no hurt to the perſon of the queen. 3. That the adherence of the earl of *Southampton* to the earl of *Eſſex* in *London*, tho he did not know of any other purpoſe than of a private quarrel, which the earl of *Eſſex* had againſt certain ſervants of the queen, was treaſon in him, becauſe it was a rebellion in the earl of *Eſſex*. 4. That all they, that went with the earl of *Eſſex* from *Eſſex*-houſe to *London*, whether they knew of his intent or not, were traitors, whether they departed upon the proclamation or not; but thoſe, that ſuddenly adhered to him in *London*, and departed upon the proclamation made, were within the proclamation to be pardoned: there were other points reſolved touching the manner of his trial, whereof hereafter.

The whole hiſtory of *Eſſex* his treaſon and the proceeding thereupon is ſet forth at large by *Camden anno* 44 *Eliz. p.* 604. *& ſequentibus*, wherein the charge of his indictment appears to be, that he and his accomplices had conſpired to deprive

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(*l*) *p.* 820. (*m*) And others of her council.

the queen of her crown and life, having conſulted to ſurprize the queen in the court; and that they had broken out into open rebellion by impriſoning the counſellors of the realm, by ſtirring up the *Londoners* to rebellion by tales and fictions, by aſſaulting the queen's faithful ſubjects in the city, and defending the houſe againſt the queen's forces; ſo that the great part of the indictment was compaſſing the queen's death, and the reſt of the charge were the overt-acts, which was treaſon within the ſtatute of 25 *E.* 3. with which my lord *Coke* agrees, *P. C. p.* 12.

If divers perſons levy war againſt the king, and others bring them relief of victuals *pro timore mortis, & receſſerunt quam citò potuerunt*, this was adjudged not to be a levying of war, becauſe *pro timore mortis*; *quære*, if the ſame law be in caſe of marching with them in their company for fear of death. *Co. P. C. p.* 10. *vide ſup. cap.* 8. *Mich.* 21 *E.* 3. *Rot.* 101. *Linc. coram rege. Illi, qui coacti fuerunt ad denarios recipiendos & ſimiliter coacti juraverunt, dimittuntur per curiam per manucaptionem, quia ſic in perſonis ipſorum nihil mali reperitur*, in caſe of a great riot, not unlike a levying of war, for which they were indicted of treaſon.

Rot. Par. 17 *R.* 2. *n.* 20. upon the complaint of the dukes of *Aquitain* and *Glouceſter*, ſhewing that *Thomas Talbot* and others his adherents by confederacy between them *fauxment conſpirerent pur tuer les dits dues uncles le roy & autres perſones grants de realme, & pur accomplyer le malice ſuſdit le dit* Thomas *& les autres miſtrent tout lour poiar, come notoirement eſt conus, & le dit* Thomas *ad en grand party confeſſe, en anientiſment des eſtats & de loys de voſtre realme, & ſur ceo firent divers gents lever armes, & arreyes a feire de guerre en aſſemblies & congregations a tres grant & horrible number en divers parties en les countie de Ceſtre*, and pray that it may be declared in this parliament the nature, pain and judgment of this offenſe: the concluſion whereof was thus;

" *Eſt avys au roy & a les ſeigniors de ceſt parlement en droit*
" *de meſme la bille touchant* Thomas Talbot, *que la matter con-*
" *tenus en la dite bill eſt overt & haut treaſon, & touche la*
" *perſon du roy & tout ſon realme, & pur treaſon le roy &*

" *touts*

"*touts les ſeigneurs ſuſdits adjuggent & declarant*;" and thereupon writs of proclamation for his appearance in the king's bench are ordered to iſſue for his appearance in one month, or otherwiſe to be attaint of treaſon (*n*): *vide Paſ.* 17 *R.* 2. *B. R. Rot.* 16. *Rex.* Writs of proclamation iſſued accordingly to the ſheriffs of *Yorkſhire* and *Derbyſhire*, and the ſheriffs returned *non eſt inventus*; *Talbot* afterwards came and renderd himſelf, and was committed to the *Tower*, and afterwards a *Superſedeas* came for his enlargement. (*o*)

But this declaration being only by the king and houſe of lords is not a concluſive or a ſufficient declaration of treaſon according to the purview of this ſtatute, but yet it was a real levying of war againſt the king, becauſe done *more guerrino* and by people arrayed *de fet de guerre*, as in *Benſted's* caſe hereafter mentiond; but had it been a bare conſpiracy, it had not been treaſon, as appears by the ſpecial ſtatute of 3 *H.* 7. *cap.* 14. whereby a conſpiracy to kill the king without an overt-act, (for then it were treaſon within the ſtatute of 25 *E.* 3.) or a conſpiracy to kill any of his privy council and certain great officers, tho the event followed not, is made felony.

See for inſtances of very great riots with multitudes of perſons *modo guerrino arraiati*, which yet amounted not to high treaſon, becauſe upon particular quarrels and differences between private perſons. *Clauſ.* 5 *E.* 2. *M.* 4. *inter* Griffinum *de* Pole & Johannem *de* Cherleton *pro caſtro de* Pole. *Pat.* 8 *E.* 4. *part* 1. *n.* 7. *dorſ.* between the citizens and biſhop of *Norwich* (*p*). *Rot. Parl.* 5 *R.* 2. *n.* 45. between the town and univerſity of *Cambridge*. *Rot. Parl.* 11 *H.* 4. *n.* 37. *& ſequentibus*, between *Hugh de Erdeſwich* and others touching the caſtle of *Botball*. *Rot. Parl.* 13 *H.* 4. *n.* 12. between the lord *Roſs* Sir *Robert Tyrrhyt* touching *Turbary* in *Wroughly*. *Rot. Parl.* 4

2 *H.* 5.

(*n*) And all perſons, that ſhall receive the ſaid Sir *Thomas Talbot* within the realm of *England*, after the ſaid month elapſed from the time of the ſaid proclamation, are declared guilty of high treaſon upon conviction of ſuch harbouring or receiving.

(*o*) The *Superſedeas* was not expreſly for his enlargement, *Sed quod ſuicunq; proceſſus verſus ipſum* Thomam Talbot *ex cauſis prædictis ulterius faciendo ſuperſedeant, quouſque aliud a rege inde habuerint in mandatis.*

(*p*) This is not to be found among the records.

H. 5. *n.* 15. between *Robert Whittington* and *Philip Lingdon* and others. *H.* 26 *E.* 3. *Rot.* 30. *Rex. Fitzwater*'s caſe. (*q*)

All which, tho they were enormous riots, and done *more guerrino*, yet being private and particular quarrels, not much unlike that between the earls of *Glouceſter* and *Hereford*; did not amount to high treaſon, but contempts, riots; or; if death enſued, felony, as the caſe required.

But going in a warlike manner with drums and arms to ſurprize the archbiſhop of *Canterbury*; who was a privy counſellor, it being with drums and a multitude (as the indictment was) to the number of three hundred perſons, was ruled treaſon by all the judges of *England*, and the offenders had judgment accordingly; and at the ſame time by ten of the judges it was agreed, that the breaking of priſon, where traitors were in durance, and cauſing them to eſcape was treaſon, altho the parties did not know that there were any traitors there, upon the caſe of 1 *H.* 6. 5. *b.* and ſo to break a priſon where felons are, whereby they eſcape, is felony without knowing them to be impriſoned for ſuch offenſe. *P.* 16 *Car. Croke, Thomas Benſted*'s caſe. (*r*)

Jeſ. C. L. 102. n. 1

The caſe of Sir *John Oldcaſtle* for levying of war againſt the king is entred *Rot. Parl.* 5 *H.* 5. *n.* 11.

The twenty-fifth of *September anno domini* 1413, *Thomas* archbiſhop of *Canterbury* the pope's legate by his ſentence definitive declared Sir *John Oldcaſtle* lord *Cobham* an heretic, eſpecially in the point of the ſacrament of the euchariſt and penance, excommunicated him, *relinquentes ipſum ex nunc tanquam hereticum judicio ſeculari.* (*ſ*)

Hill. 1 *H.* 5. *Rot.* 7. *inter placita regis, Middleſex*, there is an indictment againſt him before certain commiſſioners of *oyer*

(*q*) *Nicholas Brundiſh* and others to the number of one hundred were ſent by Sir *John Fitzwauter* armed *platis, gladiis, bokelariis, arcubus & ſagittis ad modum guerræ* to ſeize and take *boves, aſinos*, &c. of *Thomas Hubert* in *Herlawr* upon the lands of the ſaid *Thomas, quas tenuit de aliis dominis & nihil de ipſo Johanne Fitzwauter*; accordingly they did ſo, and carried them away to manors belonging to the ſaid Sir *John*; but neither this riot, nor any other the facts, which he or his accomplices were indicted for, were conceived to amount to treaſon, ſince none of them were arraigned of more than felony; *vide ſupra in motis, p.* 137.

(*r*) *Cro. Car.* 583. *W. Jones* 453.

(*ſ*) See *State Tr. Vol.* I. *p.* 42.

and *terminer* of *London* and *Middleſex*, returned into the king's bench to this effect: (*t*)

" Quod *Johannes Oldecaſtell* de *Coulyng* in com' *Kanc'* chiva-
" ler, & alii lollardi vulgariter nuncupati, qui contra fi-
" dem catholicam diverſas opiniones hæreticas & alios er-
" rores manifeſtos legi catholicæ repugnantes, a diu eſt, te-
" merariè tenuerunt opiniones & errores prædictos manute-
" nere, aut in facto minimè perimplere valentes, quam diu
" regia poteſtas & tam ſtatus regalis domini noſtri regis,
" quàm ſtatus & officium prælatiæ dignitatis, infra regnum
" *Angliæ* in proſperitate perſeverarent; falſò & proditoriè
" machinando tam ſtatum regium quàm ſtatum & officium
" prælatorum, nec non ordines religioſorum infra dictum reg-
" num *Angliæ* penitus adnullare ac dominum noſtrum regem,
" fratres ſuos, prælatos & alios magnates ejuſdem regni in-
" terficere, nec non viros religioſos, relictis cultibus divinis
" & religioſis obſervantiis, ad occupationes mundanas provo-
" care; & tam eccleſias cathedrales, quàm alias eccleſias &
" domos religioſas de reliquiis & aliis bonis eccleſiaſticis tota-
" liter ſpoliare ac funditus ad terram proſternere, & dictum
" *Johannem Oldecaſtell* regentem ejuſdem regni conſtituere, &
" quamplura regimina ſecundum eorum voluntatem infra
" regnum prædictum, quaſi gens ſine capite, in finalem de-
" ſtructionem tam fidei catholicæ & cleri, quam ſtatus &
" majeſtatis dignitatis regalis, infra idem regnum ordinare,
" falſò & proditoriè ordinaverunt & propoſuerunt, quòd
" ipſi inſimul cum quampluribus rebellibus domini regis ig-
" notis ad numerum viginti millium hominum de diverſis
" partibus regni *Angliæ* modo guerrino arraiatis privatim in-
" ſurgerent, & die Mercurii proximo poſt feſtum *Epiphaniæ*
" domini anno regni regis nunc primo apud *Villam* & paro-
" chiam ſancti *Egidii* extra barram veteris *Templi London* in
" quodam magno campo ibidem unanimiter convenirent &
" inſimul obviarent pro nefando propoſito ſuo in præmiſſis

" perim-

(*t*) See *State Tr. Vol.* VI. *Appendix p.* 4. *Fox* in his acts and monuments, *Vol.* I. *p.* 655. brings ſeveral arguments to prove this indictment to be a forged one; but whatever the indictment was, there is reaſon ſufficient to believe the pretended conſpiracy was ſo. See *Rapin's* hiſtory *ſub anno* 1414.

" perimplendo, quo quidem die Mercurii apud *Villam* & pa-
" rochiam prædictas prædicti *Johannes Oldecaſtell* & alii in hu-
" juſmodi propoſito proditorio perſeverantes prædictum do-
" minum noſtrum regem, fratres ſuos, viz. *Thomam* ducem
" *Clarenciæ*, *Johannem* de *Lancaſtre*, & *Humfridum* de *Lan-*
" *caſtre*, nec non prælatos & magnates prædictos interficere,
" nec non ipſum dominum noſtrum regem & hæredes
" ſuos de regno ſuo prædicto exhæredare, & præmiſſa omnia
" & ſingula, nec non quamplura alia mala & intolerabilia
" facere & perimplere, falſò & proditoriè propoſuerunt
" & imaginaverunt, & ibidem verſus campum prædictum
" modo guerrino arraiati proditoriè modo inſurrectionis con-
" tra ligeantias ſuas equitaverunt ad debellandum dictum do-
" minum noſtrum regem, niſi per ipſum manu forti gratioſè
" impediti fuiſſent, quod quidem indictamentum dominus
" rex nunc certis de cauſis coram eo venire fecit terminan-
" dum——Per quod præceptum fuit vic' quod non omitte-
" ret, &c. quin caperet præfatum *Johannem Oldecaſtell*, ſi, &c.
" & ſalvo, &c." upon this indictment removed into the king's bench he was outlawed.

All this record and proceſs at the requeſt of the commons was removed into parliament, and in the preſence of the *cuſtos regni*, lords, and commons was read, and expounded in *Engliſh* to Sir *John Oldcaſtle*, and it was demanded what he could ſay why execution ſhould not be done upon him upon that utlary; and he ſaying nothing in his excuſe " *pur*
" *que agard eſt en meſme le parlement per les ſeigneurs avant*
" *dits, de l'aſſent de le dit gardein, & a la pryer ſuiſdit, qe le*
" *dit* John, *come traytour a dieu & heretique notoirement ap-*
" *prove & adjugge, come peirt per un inſtrument l'archeveſque*
" *conſue ala dors de ceſt roll, & come traytour a roy & a ſon*
" *roialme, ſoit ameſne a la* Tower *de* Londres, *& illoeques ſoit*
" *treins per my le city de* Londres, *tanque as novel furches en*
" *le paroche de St.* Giles *hors de la barre de viel* Temple *de*
" Londres, *& illoeques ſoit pendus, & ars pendant.* (u)

How

(u) The author of the trial of Sir *John Oldcaſtle* ſays, that this ſentence was in purſuance of an act of parliament, which appointed that puniſhment in thoſe caſes. See *State Tr. Vol.* I. *p.* 49.

How this nobleman was purſued by the eccleſiaſtics, and the whole ſtory is ſet down by *Walſingham.*

That which I obſerve in it is, 1. That the indictment is principally founded upon that article of this ſtatute of compaſſing the king's death, and yet the overt-act is an aſſembly to levy war, and actual levying of war. 2. Altho this indictment is not expreſly upon this clauſe of levying of war, for that is not the principal charge of the indictment, but compaſſing the king's death, yet the marching with a great army to St. *Giles's modo guerrino arraiati* was an expreſs levying of war, tho there were no blow yet ſtruck. But 3. it ſeems their firſt meeting to contrive their coming to St. *Giles's*, tho it might be an overt-act to compaſs the king's death, and ſo treaſon within the firſt clauſe of the ſtatute, yet was not an actual levying of war, and ſo not treaſon within that clauſe of the ſtatute; but their actual marching in a body *modo guerrino & modo inſurrectionis* might be a levying of war within the ſtatute. 4. That actual levying of war, tho it be a treaſon, upon which *Oldcaſtle* might have been indicted, yet it was alſo an overt-act to ſerve an indictment for compaſſing the king's death, as hath been ſhewed at large before.

If there be an actual rebellion or inſurrection, it is a levying of war within this act; and by the name of levying of war it muſt be expreſſed in the indictment. *Co. P. C. p.* 10.

And in *Anderſon's Rep. part* 2. *n.* 2. after *Trinity-term* 37 *Eliz.* (*x*) before the two chief juſtices, maſter of the rolls, baron *Clerk* and *Ewens*, the caſe was, that divers apprentices of *London* and *Southwark* were committed to priſon for riots, and for making proclamation concerning the prices of victuals, ſome whereof were ſentenced in the ſtar-chamber to be ſet in the pillory and whipt; after which divers other apprentices and one *Grant* of *Uxbridge* conſpire to take and deliver thoſe apprentices out of ward, to kill the mayor of *London*, and to burn his houſe, and to break open two houſes near the *Tower*, where there were divers weapons and arms for three hundred men, and there to furniſh themſelves with weapons; after which divers apprentices deviſed libels, moving others to take

part

(*x*) 2 *And.* 4.

part with them in their devices, and to aſſemble themſelves at *Bun-hill* and *Tower-hill*; and accordingly divers aſſembled themſelves at *Bun-hill*, and three hundred at the *Tower*, where they had a trumpet, and one that held a cloke upon a pole in lieu of a flag, and in going towards the lord mayor's houſe the ſheriffs and ſword-bearer with others offered to reſiſt them; againſt whom the apprentices offerd violence.

And it was agreed by the judges referees, that this was treaſon within the ſtatute of 13 *Eliz.* for intending to levy war againſt the queen; for they held, that if any do intend to levy war for any thing, that the queen by her laws or juſtice ought or may do in government as queen, that ſhall be intended a levying of war againſt the queen; and it is not material, that they intended no ill to the perſon of the queen, but if intended againſt the office and authority of the queen, to levy war, this is within the words and intent of the ſtatute, and hereupon *Grant* and divers others were indicted and executed.

And *eodem libro n.* 49. (*y*) the caſe of *Burton* mentiond by my lord *Coke*, *P. C. p.* 10. is reported, *viz.* in the county of *Oxford* divers perſons conſpire to aſſemble themſelves, and move others to riſe and pull down incloſures, and to effect it they determined to go to the lord *Norris*'s houſe and others, to take their arms, horſes and other things, and to kill divers gentlemen, and thence to go to *London*, where they ſaid many would take their parts; and this appeared by their confeſſions: and it was agreed, 1. That this was treaſon within the ſtatute of 13 *Eliz.* for conſpiring to levy war againſt the queen. 2. But not within the ſtatute of 25 *E.* 3. becauſe no war was levied, and that ſtatute extended not to a conſpiracy to levy war.

Nota; in both theſe caſes there was a conſpiring to arm themſelves as well as to aſſemble, which had they effected and ſo aſſembled *more guerrino*, it had been a war levied, and by conſtruction and interpretation a war levied againſt the queen.

(*y*) 2 *And.* 66.

If any with weapons invaſive or defenſive doth hold and defend a caſtle or fort againſt the king and his power, this is a levying of war againſt the king within this act. *Co. P. C. p.* 10. *Vide* the ſtatute 13 *Eliz. cap.* 1. *& dicta ibid. poſtea.*

There is a great difference between an inſurrection upon the account of a civil intereſt and a levying of war.

A. recovers poſſeſſion againſt *B.* of a houſe, *&c.* in a real action, or in an *ejectione firmæ*, and a writ of ſeiſin or poſſeſſion goes to the ſheriff, *B.* holds his houſe againſt the ſheriff with force, and aſſembles perſons with weapons for that purpoſe, who keep the houſe with a ſtrong hand againſt the ſheriff, tho aſſiſted with the *poſſe comitatus:* this is no treaſon either in *B.* or his accomplices, but only a great riot and miſdemeanor; the like is to be ſaid touching a man that keeps poſſeſſion againſt a reſtitution upon an indictment of forcible entry.

But if *B.* either fortifies his own houſe or the houſe of another with weapons defenſive or invaſive purpoſely to make head againſt the king and to ſecure himſelf againſt the king's regal army or forces, then that is a levying of war againſt the king.

But the bare detaining of the king's caſtles or ſhips ſeems no levying of war within this ſtatute: *vide infra* 13 *Eliz. cap.* 1. *& dicta ibidem.*

If the king's lieutenant in a time of hoſtility or rebellion within the realm be aſſaulted upon their march or in their quarters as enemies, this is a levying of war; but if upon ſome ſudden falling out or injury done by the ſoldiers, the countrymen riſe upon them and drive them out, this may be a great riot, and if any be killed by the aſſailants it is felony in them; but this ſeems not a levying of war againſt the king, unleſs there be ſome traitorous deſign under the cover of it: and *clauſ.* 26 *E.* 3. *m.* 24. it appears, that an open reſiſtance of the juſtices of *oyer* and *terminer* in the county of *Surrey, viz. reſiſtendo juſticiariis, & ipſos juſticiarios, quo minus contenta in commiſſione noſtrâ eis inde facta exequi & facere potuerunt, impediendo,* was felony, and the offenders were executed for the ſame as felons.

Touch-

I ſhall conclude this matter with a conſultation of the judges, where I was preſent. All the judges except *J. Windham* and *J. Atkins* were aſſembled by my lord keeper *September* 1675. to conſider of this caſe, as it was ſtated in writing by the attorney general in manner following.

" A great number of the weavers in and about *London* " being offended at the engine-looms, (which are inſtru- " ments, that have been uſed above theſe ſixty years,) be- " cauſe thereby one man can do as much in a day, as " near twenty men without them, and by conſequence can " afford his ribbands at a much cheaper rate, after attempts " in parliament and elſewhere to ſuppreſs them did agree " among themſelves to riſe and go from houſe to houſe to take " and deſtroy the engine-looms; in purſuance of which they " did on the 9th, 10th and 11th of this inſtant *Auguſt* aſſemble " themſelves in great numbers at ſome places to an hundred, " at others to four hundred, and at others, particularly at " *Stratford-Bow* to about fifteen hundred.

" They did in a moſt violent manner break open the " houſes of many of the king's ſubjects, in which ſuch " engine-looms were, or were by them ſuſpected to be, " they took away the engines and making great fires burnt " the ſame, and not only the looms, but in many places the " ribbands made thereby and ſeveral other goods of the per- " ſons, whoſe houſes they broke open; this they did not " in one place only, but in ſeveral places and counties, " *viz. Middleſex, London, Eſſex, Kent* and *Surrey*, in the " laſt of which, *viz.* at *Southwark* they ſtormed the houſe " of one *Thomas Bybby*, and tho they were reſiſted and one " of them kild and another wounded, yet at laſt they " forced their way in, took away his looms and burnt " them; the value of the damage they did is computed " to ſeveral thouſand pounds.

" This they did after ſeveral proclamations made and " command given by the juſtices of peace and the ſheriffs " of *Middleſex* to depart, but inſtead of obeying they re-

" ſiſted

" ſiſted and affronted the magiſtrates and officers: It is
" true they had no warlike arms, but that was ſupplied by
" their number, and they had ſuch weapons, as ſuch a rab-
" ble could get, as ſtaves, clubs, ſledges, hammers, and other
" ſuch inſtruments to force open doors.

" There was this further evil attending this inſurrection,
" that the ſoldiers and officers of the militia were ſo far
" from doing their duty in ſuppreſſing them, that ſome,
" tho in arms and drawn up in companies, ſtood ſtill look-
" ing on while their neighbours houſes were broken open
" and their goods deſtroyed, others incouraged them, and
" others, to whoſe cuſtody ſome of the offenders, who were
" taken, were committed, ſufferd them to eſcape, ſo that
" during all the time of the tumult little or nothing was
" done to ſuppreſs them, until the lords of the council were
" conſtrained at a time extraordinary to aſſemble, by whoſe
" directions and orders as well to the civil magiſtrates, as
" to the king's guards, they were at laſt quieted.

Five of the judges ſeemed to be of opinion that this was treaſon within the act of 25 *E.* 3. upon the clauſe of levying war againſt the king, or at leaſt upon the clauſe of the ſtatute of 13 *Car.* 2. *cap.* 1.

1. In reſpect of the manner of their aſſembling, who, tho they had no weapons or enſigns of war, yet their multitudes ſupplied that defect, being able to do that by their multitudes, which a leſſer number of armed men might ſcarce be able to effect by their weapons; and beſides they had ſtaves, and clubs, and ſome hammers or ſledges to break open houſes, and accordingly they acted by breaking open doors and burning the engine-looms and many of the wares made by them.

2. In reſpect of the deſign itſelf, which was to burn and deſtroy not the ſingle engine-looms of this or that particular perſon, but engine-looms in general, and that not in

one county only, but in ſeveral counties, and ſo agreeable to *Burton*'s caſe.

The other five judges were not ſatisfied, that this was treaſon within the clauſe of 25 *E.* 3. againſt levying of war, nor within the ſtatute of 13 *Car.* 2. for conſpiring to levy war.

1. It was agreed, that if men aſſemble together and conſult to raiſe a force immediately or directly againſt the king's perſon, or to reſtrain or depoſe him, whether the number of the perſons were more or leſs, or whether armed or unarmed, tho this were not a treaſon within this clauſe of the ſtatute of 25 *E.* 3. yet it was treaſon within the firſt clauſe of compaſſing the king's death, and an overt-act ſufficient to make good ſuch an indictment, tho no war was actually levied; and with this accord the reſolutions before cited, eſpecially that of the inſurrection in the north at *Farley* wood (*); but no ſuch conſpiracy or compaſſing appears in this caſe, and ſo that is not now in queſtion, but we are only upon a point of conſtructive or interpretative levying of war.

2. Here is nothing in this caſe of any conſpiring to do any thing, but what they really and fully effected; they agreed to riſe in multitudes to burn the looms, and accordingly they did it, but nothing of conſpiring againſt the ſafety of the king's perſon, or to arm themſelves; therefore if what they did were not a levying of war againſt the king within the ſtatute of 25 *E.* 3. here appears no conſpiring to levy ſuch war within the ſtatute of 13 *Car.* 2. *cap.* 1. for, for what appears, all was done, which they conſpired to do.

3. It ſeemed very doubtful to them, whether in the manner of this aſſembling it was any levying of war, or whether it were more than a riot, for in all indictments of this kind for levying of war it is laid, that they were *more guerrino*

(*) *Vide ſupra p.* 110.

guerrino arraiati, and upon the evidence, that they were aſſembled in a poſture of war *armis offenſivis & defenſivis*, and ſometimes particular circumſtances alſo proved or found, as banners, trumpets, drums, *&c.* and where they were indicted for conſpiring only to levy war, yet there was this circumſtance accompanied it, *viz.* a confederacy to get arms and arm themſelves, as in *Grant*'s caſe, and *Burton*'s caſe.

4. It ſeemed very doubtful to them, whether this deſign to burn engine-looms were ſuch a deſign, as would make it a levying of war againſt the king (*), for it was not like the deſigns of altering religion, laws, pulling down incloſures generally, as in *Burton*'s caſe, nor to deſtroy any trade, but only a particular quarrel and grievance between men of the ſame trade againſt a particular engine, that they thought a grievance to them, which, tho it was an enormous riot, yet it would be difficult to make it treaſon. *Vide ſtatutes* 8 *H.* 6. *cap.* 27. 9 *H.* 6. *cap.* 5. (†).

Many of them therefore concluded, that if Mr. Attorney ſhould think fit to proceed as for a treaſon, the matter might be ſpecially found and ſo left to farther advice, or rather that according to the clauſe of the ſtatute of 25 *E.* 3. the declarative judgment of the king and both houſes of parliament might be had, becauſe it was a new caſe and materially differd from other caſes of like nature formerly reſolved.

Upon the concluſion of this debate we all departed, and Mr. Attorney upon conſideration of the whole matter it ſeems thought fit to proceed for a riot, and cauſed many of them to be indicted for riots, for which they were convicted and had great fines ſet upon them, and were committed in execution and adjudged to ſtand upon the pillory.

Touch-

3

(*) By 12 *Geo.* 1. *cap.* 34. "If any "perſon ſhall wilfully break any tools "uſed in the woollen manufacture, not "having the conſent of the owner, or ſhall "break or enter by force into any houſe "or ſhop by night or by day for ſuch "purpoſe, he ſhall be adjudged guilty "of felony without benefit of clergy.

(†) Concerning the riots committed by the *Welſh* upon the dragmen of *Severn*, *vide infra p.* 151.

Touching the laws of treaſon in *Ireland*, by the ſtatute of 18 *H.* 6. *cap.* 3. levying horſe or foot upon the king's ſubjects againſt their will ſhall be treaſon; this they call ceſſing of ſoldiers upon men, and hath been often done by the lieutenants or deputies of *Ireland* by conſent of the council in ſome caſes.

Among many cumulative treaſons charged upon the late earl of *Strafford* the king's deputy in *Ireland*, this one thing of ceſſing of ſoldiers upon the king's ſubjects in *Ireland* was the chief particular treaſon charged upon him.

It was inſiſted upon for the earl's defence, that by the ſtatute of 10 *H.* 7. in *Ireland*, *cap.* 22. called *Poyning*'s law, all the ſtatutes of *England* are at once enacted to be obſerved in *Ireland*; and therefore the ſtatute of 25 *E.* 3. declaring treaſons, and the ſtatute of 1 *H.* 4. *cap.* 10. enacting, that nothing ſhall be treaſon but what was within that ſtatute, the treaſons enacted in *Ireland* in the time of *H.* 6. and afterwards before 10 *H.* 7. were repeald, and conſequently this ſtatute of 18 *H.* 6. *cap.* 3.

But that ſeems not to be ſo, for the general introduction of the ſtatutes of *England* being an affirmative law could not be intended to take away thoſe particular ſtatutes, that were made in *Ireland* for the declaring of treaſon, as this and that alſo of the ſame year, *cap.* 2. for taking *Comericke*. (*z*)

But ſurely this was no levying of war within this ſtatute (*a*), either in reſpect of the matter itſelf or of the perſon that did it, he being the king's lieutenant, neither could an act by the lord deputy and council of this nature be conſtrued to be within the penalty of this act, if it were in force; yet for this and other cumulative treaſons he was attainted by act of parliament, but that attainder was very juſtly repeald by the ſtatute of 14 *Car.* 2.

Now

(*z*) That is, for taking thieves, robbers, or rebels into ſafe guard.

(*a*) Tho this were not levying of war, yet being ceſſing of ſoldiers upon the ſubject, it was treaſon within the expreſs words of that ſtatute; nor does our author aſſign any reaſon, why an act of lord deputy and council is not within the penalty of that law. See *Camd. Eliz. p.* 219.

Now I ſhall draw out ſome obſervations and concluſions from the precedents and inſtances before given touching this obſcure clauſe of levying war againſt the king.

1. A conſpiracy or confederacy to levy war againſt the king is not a levying of war within this clauſe of the ſtatute of 25 *E.* 3. for this clauſe requires a war actually levied. *Co. P. C. p.* 10.

And this appears *firſt* by thoſe temporary laws, that were made to continue during the king's or queen's life, which made conſpiring to levy war with an overt-act evidencing ſuch conſpiracy to be treaſon, as the ſtatutes of 1 *&* 2 *Ph. & M. cap.* 10. 13 *Eliz. cap.* 1. and 13 *Car.* 2. *cap.* 1. and *ſecondly* by the reſolution of the judges in the caſe of *Burton* 39 *Eliz.* cited by my lord *Coke*, *P. C. p.* 9, 10.

2. That yet ſuch a conſpiracy or compaſſing to levy war againſt the king directly or againſt his forces, and meeting and conſulting for the effecting of it, whether the number of the conſpirators be more or leſs, or diſguiſed under any other pretenſe whatſoever, as of reformation of abuſes, caſting down incloſures particular or generally, nay of wreſtling, football-playing, cock-fighting; yet if it can appear, that they conſulted or reſolved to raiſe a power immediately againſt the king, or the liberty or ſafety of his perſon, this congregating of people for this intent, tho no war be actually levied, is an overt-act to maintain an indictment, for compaſſing the king's death within the firſt clauſe of the ſtatute of 25 *E.* 3. for it is a kind of natural or neceſſary conſequence, that he, that attempts to ſubdue and conquer the king, cannot intend leſs, than the taking away his life; and indeed it hath been always the miſerable conſequence of ſuch a conqueſt, as is witneſſed by the miſerable tragedies of *E.* 2. and *R.* 2. and this was the caſe of *Oldcaſtle* and *Eſſex*.

3. That yet conſpiring to levy war, (*viz.* to do ſuch an act, which if it were accompliſhed and attained its end would be an actual levying of war) and being accompanied with an overt-act evidencing it, (tho it be not treaſon within this clauſe of the act of 25 *E.* 3.) yet was treaſon during the

queen's life by the ſtatute of 13 *Eliz. cap.* 1. and is treaſon at this day by the ſtatute of 13 *Car.* 2. *cap.* 1. during the life of our now ſovereign.

But then the overt-act (be it ſpeaking, writing, or acting) required by theſe ſtatutes to evidence the ſame muſt be ſpecially laid in the indictment, and proved upon the evidence; thus in *Grant*'s caſe and *Burton*'s caſe the conſpiring to fetch arms at the houſes therein mentiond was an overt-act proving this conſpiracy to levy war.

4. That a levying of war with all the circumſtances imaginable to give it that denomination, as *cum vexillis explicatis, cum multitudine gentium armatarum & modo guerrino arraiat*; yet if it be upon a mere private quarrel between private, tho great perſons, or to throw down the incloſures of ſuch a manor or park, where the party tho without title claims a common, or upon diſpute concerning the propriety of liberties or franchiſes, this, tho it be in the manner of it a levying of war, yet it is not a levying of war againſt the king, tho bloodſhed or burning of houſes enſue in that attempt, but is a great riot, for which the offenders ought to be fined and impriſoned; and if any be killed by the rioters in the riot, it may be murder in the aſſailant.

This was the caſe of the earls of *Glouceſter* and *Hereford anno* 20 *E.* 1. tho before the ſtatute of 25 *E.* 3. and the ſeveral great riots above-mentiond, to which we may add *Rot. Parl.* 50 *E.* 3. *n.* 140, 164. 11 *H.* 4. *n.* 36, 57. 13 *H.* 4. *n.* 14. 18 *H.* 6. *n.* 30.

5. An actual levying of war therefore againſt the king to make a treaſon, for which the offender may be indicted upon this clauſe of the ſtatute for levying of war againſt the king, conſiſts of two principal parts or ingredients, *viz.* 1. It muſt be a levying of war. 2. It muſt be a levying of war againſt the king.

6. What ſhall be ſaid a levying of war is partly a queſtion of fact, for it is not every unlawful or riotous aſſembly of many perſons to do an unlawful act, tho *de facto* they commit the act they intend, that makes a levying of war, for

then every riot would be treaſon, and all the acts againſt riotous and unlawful aſſemblies, as 13 *H.* 4. *cap.* 7. 2 *H.* 5. *cap.* 8. 8 *H.* 6. *cap.* 14. and many more (*b*) had been vain and needleſs; but it muſt be ſuch an aſſembly as carries with it *ſpeciem belli*, as if they ride or march *vexilis explicatis*, or if they be formed into companies, or furniſhed with military officers, or if they are armed with military weapons, as ſwords, guns, bills, halberds, pikes, and are ſo circumſtanced, that it may be reaſonably concluded they are in a poſture of war, which circumſtances are ſo various, that it is hard to define them all particularly.

Foſt. C. L. 208.

Only the general expreſſion in all the indictments of this nature, that I have ſeen, are *more guerrino arraiati*, and ſometimes other particulars added as the fact will bear, as *cum vexillis explicatis, cum armis defenſivis & offenſivis, cum tympanis & tubis*: but altho it be a queſtion of fact, whether war be levied or conſpired to be levied, which depends upon evidence, yet ſome overt-act muſt be ſhewn in the indictment, upon which the court may judge; and this is uſually *modo guerrino arraiati*, or *armati*, or conſpiring to get arms to arm themſelves.

And therefore in the caſes of *Burton* and *Grant* before-mentiond, who were indicted and convicted upon the ſtatute of 13 *Eliz. cap.* 1. for conſpiring to levy war for pulling down incloſures, *&c.* there is not only a conſpiracy to do the thing, but alſo to gain arms and weapons at the lord *Norris*'s houſe, and elſewhere to arm themſelves for that attempt.

And the reaſon hereof ſeems to be, becauſe, when an aſſembly of people thus arm themſelves, it is a plain evidence, that they mean to defend themſelves, and make good their attempts by a military force, and to reſiſt and ſubdue all power, that ſhall be uſed to ſuppreſs them; and beſides the very uſe of weapons by ſuch an aſſembly without the king's licence, unleſs in ſome lawful and ſpecial caſes, carries a terror with it, and a preſumption of warlike force, and therefore under a diſtinct and ſpecial reſtraint by the ſtatute of

1 *Weſtminſt.* 2.

(*b*) See 3 & 4 *Edw.* VI. *cap.* 5. 1 *Mar. cap.* 12. 1 *Geo.* I. *cap.* 5.

Weſtminſt. 2. (*c*), and the ſtatute (*d*) of 7 *E.* 1. *de defenſione portandi arma.*

7. Whether the bare aſſembling of an enormious multitude for doing of theſe unlawful acts without any weapons, or being *more guerrino arrayati*, eſpecially in caſe of interpretative or conſtructive levying of war, be a ſufficient overt-act to make a levying of war within this act, eſpecially if they commit ſome of theſe acts themſelves, is very conſiderable and ſeems to me doubtful, 1. Becauſe I have not known any ſuch caſe ruled. 2. Becauſe the acts of 3 & 4 *Ed.* 6. *cap.* 5. and 1 *Mar. cap.* 12. (which muſt be intended of ſuch unarmed aſſemblies) makes it in ſome caſes felony, in ſome caſes only miſdemeanor. 3. Becauſe it is very difficult to determine what that number muſt be, that muſt make treaſon, and leſs than which muſt be only a riot; this therefore ſhould be well conſidered, and the direction of the ſtatute of 25 *E.* 3. to expect the declaration of parliament in like caſes is a ſafe direction, and ſo much the rather, becauſe the ſtatutes of *E.* 6. and queen *Mary* ſeem to look the other way (*e*), to which may be added the great riots committed by the foreſters and *Welſh* upon the dragmen of *Severn*, hewing all their boats to pieces, and drowning the bargemen in a warlike poſture. *Rot. Parl.* 8 *H.* 6. *n.* 30, 45. 9 *H.* 6. *n.* 37. upon which the ſtatute of 9 *H.* 6. *cap.* 5. was made: I forbear therefore any opinion herein.

8. But whether the aſſembly were greater or leſs, or armed or not armed, yet if the deſign were directly againſt the king, as to do him bodily harm, to impriſon, to reſtrain him, or to offer any force or violence to him, it will be treaſon within the firſt clauſe of compaſſing the king's death, and this aſſembling and conſulting or practiſing together to this purpoſe, tho of but two or three, will be an overt-act to prove it; therefore all the queſtion will be only touching inter-

(*c*) I dont find any thing to this purpoſe in the ſtatute of *Weſtminſt.* 2. So ſuppoſe the ſtatute here meant is the ſtatute of *Northampton* 2 *E.* 3. *cap.* 3. whereby it is prohibited that any one bring force in affray of the people, or go armed by night or by day. See *Co. P. C. p.* 158 & 160. *F. N. B. p.* 552.

(*d*) Or rather proclamation: ſee the beginning of this chapter.

(*e*) As does alſo 1 *Geo.* I. *cap.* 5.

interpretative or conſtructive levying of war, whereof hereafter.

9. If there be war levied as is above declared, *viz.* an aſſembly *more guerrino arrâiati*, and ſo in the poſture of war for any treaſonable attempt; this is *bellum levatum*, tho not *bellum percuſſum*; and thus far touching the levying of war, as in relation to the manner of it.

10. But beſides the circumſtances requiſite to denominate a levying of war in reſpect of the manner of it, there is alſo requiſite to make a treaſon within this clauſe, that it be a levying of war *againſt the king*, which is the ſcope, end and termination thereof, for, as hath been ſaid, there may be a levying of war between private perſons upon private quarrels, which is not a levying of war againſt the king, and ſo not treaſon within this clauſe of this act.

11. A levying of war againſt the king therefore is of two kinds, either expreſly and directly, or by way of interpretation, conſtruction or expoſition of this act: the former is, when a war is levied againſt the perſon of the king, or againſt his general, or army by him appointed, or to do the king any bodily harm, or to impriſon him, or to reſtrain him of his liberty, or to get him into their power, or to enforce him to put away his miniſters, or to depoſe him; many inſtances of this kind may be given, ſuch as was in truth the riding of the earl of *Eſſex* into *London* armed with ſwords and piſtols, his ſolliciting of the citizens to go with him to court to remove from the queen her miniſters and counſellors, his fortifying of his houſe againſt the queen's officers, which were in truth a levying of war, tho his indictment was upon the firſt claune of compaſſing the queen's death, which was more clearly included within theſe actions.

12. Conſtructive or interpretative levying of war is not ſo much againſt the king's perſon, as againſt his government: if men aſſemble together *more guerrino* to kill one of his majeſty's privy council, this hath been ruled to be levying of war againſt the king. *P.* 16 *Car.* 1. *Cro.* 583. *Benſted*'s caſe before cited, and accordingly was the reſolution of the houſe of lords 17 *R.* 2. *Talbot*'s caſe above-mentiond.

So in the caſe mentiond by my lord *Coke* in the time of *H.* 8. *Co. P. C. p.* 10. levying war againſt the ſtatute of *Labourers* and to inhance ſervants wages was a levying of war againſt the king; and altho levying of war to demoliſh ſome *particular* incloſures is not a levying of war againſt the king, *Co. P. C. p.* 9. yet if it be to alter religion eſtabliſhed by law, or to go from town to town *generally* to caſt down incloſures, or to deliver *generally* out of priſon perſons lawfully impriſoned, this hath been held to be levying of war againſt the king within this act, and the conſpiring to levy war for thoſe purpoſes treaſon within that clauſe of the act of 13 *Eliz. cap.* 1. as was reſolved in *Burton*'s caſe and *Grant*'s caſe abovementiond; and the like reſolution was in the caſe of the apprentices that aſſembled *more guerrino* to pull down bawdy-houſes.

It is conſiderable how theſe reſolutions ſtand with the judgment of parliament in 3 & 4 *Ed.* 6. *cap.* 12. which makes ſpecial proviſions to make aſſemblies above twelve to alter the laws and ſtatutes of the kingdom, or the religion eſtabliſhed by law, or if above forty aſſemble for pulling down incloſures, burning of houſes, or ſtacks of corn, treaſon, if they departed not to their homes within an hour after proclamation, or after proclamation put any of theſe deſigns in practice, which is nevertheleſs reduced to felony within clergy by the ſtatute of 1 *Mar. ſeſſ.* 2. *cap.* 12. Theſe offenſes being the ſame with thoſe adjudged treaſon in *Burton*'s caſe and ſome others before cited, why was it thought neceſſary for an act of parliament 3 & 4 *Ed.* 6. to make it treaſon under certain qualifications, and why reduced to felony within clergy by the ſtatute of 1 *Mar. cap.* 12. and the ſtatute of 3 & 4 *E.* 6. repealed? It ſeems that altho the unlawful ends of theſe aſſemblies thus puniſhed by 3 & 4 *Ed.* 6. and 1 *Mar.* were much the ſame with thoſe of *Burton* and *Grant* and others, that were adjudged treaſon, yet the difference between the caſes ſtood not in that, but in the manner of their aſſembly; thoſe that were adjudged treaſons in *Burton*'s and *Grant*'s caſe were, becauſe it was a conſpiracy to arm themſelves and levy a war *more guerrino.*

But thoſe, that were thus heightened to treaſon by 3 & 4 *E.* 6. and reduced to felony by 1 *Mar.* were not intended of ſuch, as were *more guerrino arraiati*, nor a levying of war, tho their multitudes were often great, and tho they did put in ure the things they conſpired to effect, and ſo were but great riots and not levying war within this clauſe of 25 *E.* 3. and therefore thoſe acts inflicted a new and farther puniſhment on them.

III. *En ſon realme*: hitherto it hath been ſaid what is a levying of war; we are now to conſider the place, *En ſon realm.*

The realm of *England* comprehends the narrow ſeas, and therefore if a war be levied upon thoſe ſeas, as if any of the king's ſubjects hoſtily invade any of the king's ſhips, (which are ſo many royal caſtles) this is a levying of war within his realm, for the narrow ſeas are of the ligeance of the crown of *England*: *vide Seldeni Mare clauſum.*

And this may be tried in the county next adjacent to the coaſt by an indictment taken by the jurors for that county before ſpecial commiſſioners of *oyer* and *terminer*, *de quo vide infra*, and in the chapter of piracy: *vide* 5 *R.* 2. *Trial* 54.

It is true, before the ſtatute of 28 *H.* 8. *cap.* 15. thoſe treaſons were uſually inquired and tried by ſpecial commiſſion, wherein the admiral and his lieutenant were named, as likewiſe other felonies committed upon the ſea.

But divers inſtances were in the time of *E.* 3. whereby ſuch offenſes upon the ſea were puniſhed as treaſon or felony in the king's bench. 40 *Aſſ.* 25. A *Norman* captain of a ſhip robs the king's ſubjects upon the ſea, he being taken was hanged as a felon, but the *Engliſh* that aſſiſted him were drawn and hanged as traitors; and by the ſtatute of 28 *H.* 8. *cap.* 15. there is a direction of a ſpecial commiſſion to try them in ſuch counties or places as ſhall be aſſigned by ſuch commiſſion according to the method of trials of ſuch offenſes at the common law, but before that ſtatute they might be tried by ſpecial commiſſion at the common law, and according to the courſe of the common law; but of this *alibi in tractatu de Admiralitate.*

For

For treaſons and other capital offenſes in *Scotland* there is a proviſion made by the ſtatute of 4 *Jac. cap.* 1. and 7 *Jac. cap.* 1.

Ireland, tho part of the dominions of the crown of *England*, yet is no part of the realm of *England*, nor *infra quatuor maria*, as hath been ruled *temp. E.* 1. *Morrice Howard's* caſe: the like is to be ſaid for *Scotland* even while it was under the power of the crown of *England*, as it was in ſome times of *E.* 1. and ſome part of the time of *E.* 3. 8 *Rich.* 2. *Continual claim* 13.

For *Ireland* hath the ſame laws for treaſon that *England*, tho it hath ſome more; yet for a levying war, or other treaſon in *Ireland* the offender may be tried here in *England* by the ſtatute of 35 *H.* 8. *cap.* 2. for treaſons done out of the realm, as was reſolved in the caſe of *O-Rork*, *H.* 33 *Eliz.* (*) and after that in Sir *John Perrot's* caſe (*f*), *Co. P. C. p.* 11. 7 *Co. Rep. Calvin's* caſe, 23. *a.*

In the caſe of the lord *Macguire* (*g*) an *Iriſh* peer, who was indicted in *Middleſex* for high treaſon for levying war againſt the king in *Ireland*, he pleaded to the indictment, that he was one of the peers and lords of parliament in *Ireland*, and demanded judgment, if he ſhould be arraigned in *England* for a treaſon committed in *Ireland*, whereby he ſhould loſe the benefit of trial by his peers; but it was reſolved, 1. That for a treaſon in *Ireland* a man may be tried here in *England* by the ſtatute of 35 *H.* 8. for it is a treaſon committed out of the realm. 2. That altho *Macguire*, if tried in *Ireland* for his treaſon, ſhould have had his trial by his peers, as one of the lords in parliament, which he cannot have here, but muſt be tried by a common jury, yet that altered not the caſe; he was therefore put upon his trial by a *Middleſex* jury, and was convicted and had judgment, and was executed. *H.* 20 *Car.* 1. *B. R.* ſo that the opinion 20 *Eliz. Dy.* 360. *b.* was ruled no law: *vide Co. Litt.* 261.

And

(*) *Camd. Eliz. p.* 458. (*f*) See his trial in *State Tr. Vol.* I. *p.* 181. (*g*) *State Tr. Vol.* I. *p.* 928.

And the ſame that is ſaid of *Ireland* may be ſaid in all particulars of the iſle of *Man*, *Jerſey*, *Guernſey*, *Sark* and *Alderney*, which are parcel of the dominions of the crown of *England*, but not within the realm of *England* as to this purpoſe concerning treaſon; yet they have ſpecial laws of their own applicable to criminals and juriſdiction for their trials: as touching treaſon committed in *Wales* before the ſtatute of 26 *H.* 8. *cap.* 6. no treaſon, murder, or felony committed in *Wales* was inquirable or triable before commiſſioners of *oyer* and *terminer*, or in the king's bench in *England*, but before juſtices or commiſſioners aſſigned by the king in thoſe counties of *Wales* where the fact was committed. *P.* 2 *H.* 4. *Rot.* 18. *Salop'*: " Johannes Kynaſton *indictatus fuit quòd ipſe con-*
" *ſentiens fuit ad falſam & proditioſam inſurrectionem* Oweyn
" Glyndour *& aliorum* Wallicorum, *& ſciens de toto propoſito*
" *eorundem, qui proditioſè combuſſerunt villas de* Glyndour Dyn-
" by, *&c. & quòd proditioſè miſit* Johannem *filium ſuum benè*
" *armatum & arraiatum pro guerrâ, &* Willielmum Hunte *ſa-*
" *gittarium ad prædictum* Oweyn *& exercitum* Wallicorum,
" *&c. dicit quòd prædictæ villæ, in quibus ſupponitur proditiones*
" *prædictas factas fuiſſe, ſunt infra terram* Walliæ *& ex-*
" *tra corpus com'* Salop' *& legem terræ* Angliæ, *unde non inten-*
" *dit quòd dominus rex de proditionibus prædictis in hoc caſu*
" *ipſum impetire velit, ſeu ipſum ponere velit inde reſponſurum,*
" *& quia plenariè & certitudinaliter teſtificatum eſt, quòd præ-*
" *dictæ villæ ſunt infra terram* Walliæ *& extra corpus comitatûs*
" Salop' *& legem terræ* Angliæ, *&* Thomas Covele *attornatus*
" *ipſius regis coram ipſo rege inde examinatus hoc non dedicit, &*
" *ſic juſticiarii ad inquirendum de proditionibus prædictis infra*
" Walliam *factis virtute commiſſionis prædictæ inquirere minimè*
" *potuerunt, nec proditiones prædictæ ſic in terrâ* Walliæ *factæ per*
" *legem terræ* Angliæ *triari nec terminari poſſunt, conſideratum*
" *eſt, quòd quoad prædictas proditiones prædictus* Johannes Kyna-
" ſton *eat inde quietus, &c.*" But it is true by the ſtatute of 26 *H.* 8. *cap.* 6. counterfeiting of coin, waſhing, clipping or miniſhing of the ſame, felonies, murders, wilful burnings of houſes, manſlaughters, robberies, burglaries, rapes, and acceſ-

ſaries of the ſame and other offenſes feloniouſly done in *Wales* (*b*), or any lordſhip marcher may be inquired of, heard and determined before the juſtices of goal-delivery and of the peace and every of them in the next adjacent county: this act is confirmed by the great ſtatute of *Wales* 34 & 35 *H.* 8. *cap.* 26. which ſettles the grand ſeſſions and juſtices thereof, and gives the juſtices of the grand ſeſſions power to hold all manner of pleas of the crown, and to hear and determine all treaſons, felonies, *&c.* within the precinct of their commiſſions, as fully as the court of king's bench may do in their places within the realm of *England*; ſo that as to thoſe offenſes enumerated in the ſtatute of 26 *H.* 8. the juſtices of gaol-delivery in the adjacent counties, *viz. Glouceſter*, *Hereford*, *Salop* and *Wigorn*, had thereby a concurrent juriſdiction with the juſtices of the grand ſeſſion (*i*).

But whether the ſtatute of 26 *H.* 8. extended to treaſon for compaſſing the king's death or levying of war (*k*), or whether the ſame remained only triable by the juſtices of the grand ſeſſions, ſeems doubtful, and the rather, becauſe that ſtatute is not conſtrued by equity, and therefore it extends not to an appeal of murder in an adjacent county, and ſo it was adjudged *Hil.* 7 *Car. B. R. Semly* and *Price* (*l*); but at this day 26 *H.* 8. *cap.* 6. ſtands repealed by 1 & 2 *Ph. & M. cap.* 10. as to the trials of treaſon (*m*).

It is true, that in other criminal cauſes, that are not capital, as in caſes of indictments of riots, they may be removed by *certiorari* into the king's bench, and when iſſue is joined they may be tried in the next *Engliſh* county, *T.* 16 *Jac.* Sir *John Carew*'s caſe (*n*) and divers others, as well as in a *quo*

(*b*) For this act extends to all the antient counties of *Wales*, as well as the lordſhips marchers; and ſo it was reſolved in *Aſtbor*'s caſe for a murder in *Pembrokeſhire*. *T.* 9 *Geo.* 1. *B. R.*

(*i*) 1 *Mod.* 64, 68.

(*k*) It ſhould ſeem that it did not, and that was one reaſon of making the ſtatute of 32 *H.* 8. *cap.* 4. whereby all treaſons or miſpriſions of treaſons committed in *Wales* may be preſented and tried in ſuch ſhires and before ſuch commiſſioners as the king ſhall appoint, in like manner, as if the facts had been committed in ſuch ſhires.

(*l*) *Cro. Car.* 247. *W. Jones* 259.

(*m*) The 1 & 2 *Ph. & M.* reducing all trials for treaſon to the order and courſe of the common law is a virtual repeal of 26 *H.* 8. and by the ſame reaſon of 32 *H.* 8. alſo as to treaſon.

(*n*) *Cro. Jac.* 484. 2 *Rol.* 28. 1 *Rol. Abr.* 394.

minus, which is at the king's suit: but whether a *certiorari* lies into *Wales* upon an indictment of treason or felony hath been doubted *M.* 9 *Car. B. R. Chudley's* case (*o*): it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency or to plead his pardon, but not as to trial of the fact (*p*), but it shall be sent down by *mittimus* according to the statute of 6 *H.* 8. *cap.* 6. because it is in a manner essential for felony or treason to be tried in the proper county, unless where a statute particularly enables it, which it did in the case of 26 *H.* 8. only whilst it was in force, where the indictment as well as the trial is in the adjacent county.

But certainly *Wales* is within the kingdom of *England* (*q*), and therefore not within the statute of 35 *H.* 8. *cap.* 2. for trial of foreign treasons.

If a felony or treason be committed in *Durham*, a *certiorari* lies to remove it into the king's bench out of *Durham* directed to the justices of peace, *oyer* and *terminer*, or gaol-delivery there; for since the statute of 27 *H.* 8. *cap.* 24. they are all made by the king's commission, and so the proceedings before them are his own suit, and thus it was done in *Rutlabie's* case (*r*) upon debate; but if the party plead not guilty it shall be sent down thither to be tried, as was done in that case. *T.* 1653. They of *Durham* claim a privilege not to be sworn out of the precinct of the county palatine. *Vide* the statutes of 2 *H.* 5. *cap.* 5. 9 *H.* 5. *cap.* 7. 11 *H.* 7. *cap.* 9. for treasons and felonies in *Tindal* and *Hexamshire*.

And thus far concerning treason in levying of war against the king.

CHAP.

4

(*o*) *Cro. Car.* 331.

(*p*) But yet it has been done in felony as to the trial of the fact, as in the case of *Morris.* 1 *Ven.* 93, 146. *Herbert's* case, *Latch* 12.

(*q*) 2 *Rol.* 28.

(*r*) *Vide infra* p. 467. and *Part* II. p. 212.

CHAP. XV.

Concerning treaſon in adhering to the king's enemies *within the land or without.*

THE words of the ſtatute of 25 E. 3. go on, *viz. Ou ſoit aidant al enemies noſtre dit ſeigneur le roy en ſon royalme donant a eux ayd ou comfort en ſon royalme ou per ailliors.*

I. Therefore we ſhall inquire what ſhall be ſaid *enemies of the king*: thoſe that raiſe war againſt the king may be of two kinds, ſubjects or foreigners, the former are not properly enemies but rebels or traitors, the latter are thoſe, that come properly under the name of enemies.

This gives us occaſion to conſider ſomewhat of the nature of war and peace.

The power of making war or peace is *inter jura ſummi imperii*, and in *England* is lodged ſingly in the king, tho it ever ſucceeds beſt when done by parliamentary advice.

Peace is of two kinds, *viz.* 1. Poſitive or contracted. 2. Such a peace, as is only a negation or abſence of war: that peace, which I call poſitive, is ſuch as ariſeth by contracts, capitulations, leagues, or truces between princes or ſtates, that have *jura ſummi imperii*, and is of two kinds: 1. Temporary, which is properly a truce, which is a ceſſation from war already begun, and then the term being elapſed the princes or ſtates are *ipſo facto* in the former ſtate of war, unleſs it be protracted by new capitulations, or be otherwiſe provided in the inſtrument or contract of the truce. 2. Perpetual, *ſine termino* or indefinite, which regularly continues according to the tenor or conditions of the agreement, until ſome new war be raiſed between the princes or ſtates upon ſome emergent injury ſuppoſed to be done by the one party or the other; and this is properly called a league *fœdus*, and makes the princes and ſtates *confœderati*, and tho this may be variouſly diverſified

verſified according to the capitulations, conditions and qualifications of ſuch leagues, yet they are ordinarily of theſe kinds: 1. Leagues offenſive and defenſive, which oblige the princes not only to mutual defenſe, but alſo to be aſſiſting to each other in their military aggreſſes upon others, and makes the enemies of one in effect the common enemies of both. 2. Defenſive, but not offenſive, obliging each to ſuccour and defend the other in caſes of invaſion or war by other princes. 3. Leagues of ſimple amity, whereby the one contracts not to invade, injure or offend the other, which regularly includes alſo liberty of mutual commerce and trade, and ſafeguard of merchants and traders in either's dominions, tho this may be diverſified according to ſuch contracts as are made in ſuch leagues; and therefore in the league between king *James* of *England* and the king of *Spain* there was a tacit exception on the part of the *Spaniard* by the wary penning of the articles, whereby the freedom of our trade into the weſtern plantations of the king of *Spain* hath been ſuppoſed by the *Spaniard* to be reſtrained.

2. A peace, which is only a negation or abſence of war, is that which I call a negative peace, becauſe it is only an abſence or negation of war, there intervening no league nor articles of peace, nor yet any denunciation of war, for it is regularly true, *ubi bellum non eſt, pax eſt*, tho neither prince is under any capitulation or contract; for there are divers princes in the world, that never capitulated one with another, and yet there is no ſtate of war between them; and therefore the war by the *Spaniards* upon the *Indians*, tho under pretenſe of religion, without any juſt provocation hath been held injurious and an unjuſt aggreſſion, tho there intervened no former articles of peace between them.

War was antiently of two kinds, *bellum ſolemne vel non ſolemne*: a ſolemn war among the *Romans* had many circumſtances attending it (*a*), and was not preſently undertaken upon an injury received without theſe ſolemn circumſtances.

2 1. *Cla-*

(*a*) See the manner of it deſcribed by *Dionyſ. Hal. Lib.* II. *Agel. Lib.* XVI. *cap.* 4. and *Liv. Lib.* I. §. 32. whereby it appears, that the thirty-three days of dilation intervened between the demanding reparation and the indiction.

1. *Clarigatio* (*b*) or demanding reparation for the injuries received. 2. That being not done there followed indiction or denunciation of war. 3. Dilation or a ſpace of thirty-three days before actual hoſtility was uſed; but moſt times neceſſity and politic conſiderations both among them and other nations did diſpenſe with theſe ſolemnities, which were found oftentimes too cumberſome and inconvenient, eſpecially where the delays might occaſion ſurprizal or irreparable damage to the commonwealth, as where the adverſe party made preparations, which, if not ſuddenly repreſſed, might prove more dangerous and irreſiſtible.

But theſe ſolemn denunciations of war had place only in offenſive or invaſive wars, and even then had many exceptions.

1. If a war be actually between two princes or ſtates, and a temporary truce be made as for a year or two, that term being elapſed they are in a ſtate of war without any denunciation, for they are in the former condition, wherein they were before the truce made.

2. In caſe a forein prince in peace violate that peace and becomes the aggreſſor, or invades the other, tho without any denunciation, the prince that is upon his defenſe was not bound, neither was it neceſſary for him to make a ſolemn denunciation or proclamation of war, for this ſolemnity of denunciation was thought only requiſite on the part of the aggreſſor.

3. If after reparation of injuries ſought inſtead of reparation of the former, new are committed by the adverſe prince, as killing of an embaſſador, contemptuous rejection of all reparation or mediation touching it, great proviſions of hoſtility, or the like, there this denunciation or dilation was not requiſite in the aggreſſor; but when all is done, ſupreme princes or ſtates take themſelves to be judges of public injuries, and of the manner, means and ſeaſons for their reparations, and what they judge ſafeſt and moſt for their advantage is moſt commonly done in theſe caſes, and they ſeldom want fair declarations to juſtify themſelves therein.

(*b*) See *Plin. Lib.* XXII. *cap.* 2.

And therefore whether theſe handſome methods be obſerved or not, yet if *de facto* there be a war between princes, they and their ſubjects are in a ſtate of hoſtility, and they are in the condition of enemies (*hoſtes*) to each other; but now for the moſt part theſe antient ſolemnities are antiquated, I come therefore to the practice of our own country and modern arms, and what we may obſerve from our own books, hiſtory and monuments.

We may obſerve in the wars we have had with forein countries, that they have been of two kinds, *viz.* ſpecial and general: ſpecial kinds of war are that, which we uſually call *marque* or repriſal, and theſe again of two kinds, 1. Particular, granted to ſome particular perſons upon particular occaſions to right themſelves, for which *vide* ſtatute 4 *H.* 5. *cap.* 7. but this is not the proper place to treat touching it. 2. General *marque* or repriſal, which tho it hath the effect of a war, yet it is not a regular war, and it differs in theſe two inſtances: 1. Regularly it is not lawful for any perſon by aggreſſion to take the ſhip or goods of the adverſe party, unleſs he hath a commiſſion from the king, the admiral, or thoſe that are ſpecially appointed thereunto. 2. It doth not make the two nations in a perfect ſtate of hoſtility between them, tho they mutually take one from another, as enemies, and many times in proceſs of time theſe general repriſals grow into a very formed war: and this was the condition of the war between us and the *Dutch* 22 *February anno* 1664. the firſt beginning whereof was by that act of council, which inſtituted only a kind of univerſal repriſal, and there were particular reaſons of ſtate for it; but in proceſs of time it grew into a very war, and that without any war ſolemnly denounced; and therefore by the ſtatute of 17 *Car.* 2. *cap.* 5. *Doleman* and others, that were in *Holland*, were declared to have traitrouſly adhered to the king's enemies, and were attainted of treaſon, unleſs they rendred themſelves by a day certain, and all others, that ſerved the ſtates of the united provinces during the continuance of the war, ſoldiers or ſeamen, by ſea or land, and not returning by a time certain, were attainted of treaſon; and this had all the effects of war and

hoſtility: the goods of the *Engliſh* taken by the *Dutch* and brought *intrà præſidia* the property was wholly changed, and, tho retaken again, ſhould not be reſtored again to the firſt owner, according as in captures by enemies, 7 *E.* 4. 14. 22 *E.* 3. 16. and ſo it was practiſed during that war.

A general war is of two kinds: 1. *Bellum ſolemniter denuntiatum*, or *bellum non ſolemniter denuntiatum*, the former ſort of war is, when war is ſolemnly declared or proclaimed by our king againſt another prince or ſtate; thus after the pacification between the king and the *Dutch* at *Breda*, upon new injuries done to us by the *Dutch* the king by his printed declaration 1671. declared war againſt them; and this is the moſt formal ſolemnity of a war, that is now in uſe.

A war that is *non ſolemniter denuntiatum* is, when two nations ſlip ſuddenly into a war without any ſolemnity; and this ordinarily happeneth among us, the firſt *Dutch* war was a real war, and yet it began barely upon general letters of *marque*: again, if a forein prince invades our coaſts, or ſets upon the king's navy at ſea, hereupon a real, tho not a ſolemn war may and hath formerly ariſen, and therefore to prove a nation to be in enmity to *England*, or to prove a perſon to be an *alien enemy* there is no neceſſity of ſhowing any war proclaimed, but it may be averred, and ſo put upon trial by the country, whether there was a war or not; and therefore *P.* 31 *Eliz.* in juſtice *Owen*'s reports (*c*), in an action of debt the defendant pleaded, that the plaintiff was an *alien* born in *Gaunt* under the obedience of the king of *Spain*, enemy of the queen, the plea was ruled good, tho he ſhewed not, that any war was proclaimed between the two realms; and according is the pleading 7 *E.* 4. 13. *Raſtel*'s *Entries*, *Treſpaſs per alien.* (*d*)

And in very deed there was a ſtate of war between the crowns of *England* and *Spain*, and the *Spaniards* were actual enemies, eſpecially after the attempt of invaſion in 88. by the *Spaniſh Armada*, and yet there was no war declared or proclaimed between the two crowns, as appears by *Camden* *ſub*

(*c*) *Owen* 45. (*d*) *Raſt. Entr. f.* 605. *d.* 252. *b.*

ſub anno 31. (*e*). *ibidem p.* 404. *& ibidem p.* 466. (*f*). ſo that a ſtate of war may be between two kingdoms without any proclamation or indiction thereof or other matter of record to prove it.

And therefore in the caſe in queſtion touching treaſon it ſhall upon the trial be inquired by the jury, whether the perſon, to whom the party indicted adhered, were an enemy or not, and in order to that, whether there were a war between the king of *England* and that other prince, whereunto the party adheres, this is purely a queſtion of fact and triable by the jury, and accordingly is the book 19 *E.* 4. 6. and the reaſon is plain, becauſe it may fall out, that tho there were a league between the king of *England* and a forein prince, yet the war may be begun by the forein prince: again, ſuppoſe we, that the king of *England* and the king of *France* be in league, and no breach thereof between the two kings, yet if a ſubject born of the king of *France* makes war upon the king of *England*, a ſubject of the king of *England* adhering to him is a traitor within this law, and yet the *Frenchman*, that made the war, is not a traitor but an enemy, and ſhall be dealt with as an enemy by martial law, if taken: this was the caſe of the duke of *Norfolk* adhering to the lord *Heriſe* a ſubject of the king of *Scots* in amity with queen *Elizabeth*, that made an actual invaſion upon *England* without the king's commiſſion. *M.* 13 & 14 *Eliz. Co. P. C. p.* 11. *Camd. Eliz. ſub anno* 1571. (*g*). 14 *Eliz. p.* 175. and the caſe of *Perkin Warbeck* a *Frenchman*, 7 *Co. Rep. Calvin's* caſe (*h*). 6 *Dy.* 145. *a. Sherly's* caſe (*i*); ſo that an enemy extends farther than a king or ſtate in enmity, namely an alien coming into *England* in hoſtility.

II. In the next place I ſhall conſider what ſhall be ſaid a *perſon adhering*, and alſo what ſhall be *adhering*.

If a forein prince be in actual war againſt the king of *England*, any ſubject of that prince under his protection is preſumed to be adhering to him, but he is not a perſon within this

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(*e*) *vid.* 1588.
(*f*) *ſub anno* 1592.
(*g*) And alſo *ſub anno* 1572. *in principio.*
(*h*) 7 *Co.* 6. *b.*
(*i*) 7 *Co. Calvin's* caſe 6. *a.*

this act, for if he be taken, he ſhall be dealt with as an enemy, *viz.* he ſhall be ranſomed, and his goods within this realm ſeiſed to the uſe of the king. When king *John* was deveſted of the duchy of *Normandy* by the king of *France*, and thereupon the *Normans* forſook the alligeance of the king of *England*, which was due to him, as duke of *Normandy*, all the lands of the *Normans* in *England* were ſeiſed into the king's hands, and thence grew firſt the eſcheat *de terris Normannorum* mentiond *prærogativa regis* (*k*) *cap.* 12. and the ſtyle of ſuch forfeiture was uſually, *quia receſſit à ſervitio noſtro & adhæſit inimicis noſtris in* Normannia, *Clauſ.* 6 *John m.* 19. *pro Euſtachia uxore Luree fil* Johannis, *Clauſ.* 8 *John m.* 5. *pro Abbate Cluniacenſi*: ſee the reaſon thereof before *cap.* 10. they were *ad fidem utriuſque regis.*

If there be war between the king of *England* and the king of *France*, thoſe *Engliſhmen*, that live in *France* before the war and continue there after, are not ſimply upon that account adherents to the king's enemies, unleſs they actually aſſiſt him in his wars, or at leaſt refuſe to return upon privy ſeal, or upon proclamation and notice thereof into *England*; and this refuſal, tho it is an evidence of adherence, ſeems not to be ſimply in itſelf an adherence: this appears plainly by the ſtatute of *Magna Carta cap.* 30.

If a ſubject of a forein prince hath lived here in *England* under the protection of the king of *England*, and ſo continues after a war proclaimed, and partakes of all the benefits of a ſubject, and yet ſecretly practiſeth with the king of *France*, and aſſiſts him before he hath left this kingdom, or openly renounced his ſubjection to the crown of *England*, this man ſeems to be an adherent within this act, and commits treaſon thereby: *tamen quære, vide Dy.* 144. *a. Sherley's* caſe; and the like law ſeems to be of an enemy coming hither and ſtaying here under the king's letters of ſafe conduct: *quære, vide* ſtatute 18 *H.* 6. *cap.* 4. 20 *H.* 6. *cap.* 1.

If there be a war between the king of *England* and *France*, and then a temporary truce is made, and within the time of that truce an *Engliſhman* goes into *France*, and ſtays there,

(*k*) 17 *E.* 2.

and returns before the truce expired, this is not an adherence to an enemy within this ſtatute, *Clauſ.* 7 E. 3. *part* 1. *m.* 9. *pro Johanne Poynter*, who had an *amoveas manus cum exitibus*, his lands having been ſeiſed for that cauſe: but this record implies, that if during his ſtay (it was in *Scotland*) he had confederated or conſpired with the enemy or aſſiſted them in order to their further hoſtility, this might have been an adherence: *nota*, the reaſon, "*Quia prædictus* Johannes *tempore* "*treugarum inter patrem noſtrum &* Robertum *de* Bruys *ivit* "*in* Scotiam *per præceptum* Andreæ *de* Harcla *ad pictandum* "*quandam imaginem, quo tempore bene licuit unicuique de* An- "gliâ *intrare in* Scotiam *per licentiam & literas de conductu* "*cuſtodis Marchiæ, & quod idem* Johannes *habuit tales literas* "Andreæ *de* Harcla, *& ibidem taliter moram fecit per unum* "*annum abſque eo, quod aliquo tempore* Scotis *prædictis fuit ad-* "*hærens, & quod idem* Johannes *rediit in* Angliam *durantibus* "*treugis prædictis, & ſemper hactenus fuit ad pacem noſtram* "*& patris noſtri.*" *Nota*, this *Andrew Harcla* having been created earl of *Carliſle* was by an extrajudicial military ſentence firſt degraded, and then had judgment of high treaſon given againſt him. *H.* 18 E. 2. *Rot.* 34 *in dorſo rex.* (*l*)

If

(*l*) This ſentence of degradation, as well as the judgment for high treaſon, were pronounced at *Carliſle*, before Sir *Ralph Baſſet*, Sir *John Peche*, Sir *John de Willoughby* and *Geoffrey le Scrop*, who, together with the earl of *Kent* the king's brother and *John de Haſtinges*, were ſpecially conſtituted by letters patents, *Juſticiarii ad degradandum* Andream *de* Harcla *comitem* Carlioli, *inimicum & proditorem regis & regni ſui, quem nuper in comitem gladio cinxerat, & ad judicium de ipſo ſuper degradatione, inimicitiâ & ſeditione prædictis pronunciandum & reddendum*; and the form of the ſaid judgment to be pronounced was at the ſame time ſent to the ſaid juſtices in a certain ſchedule, *ſub ſede ſigilli regis*, the which judgment was accordingly pronounced in the following words: "Pur ceo qe noſtre ſeignor le "roi pur le graunt bien valu & loialte, "qu'il entendit davour trouve en vous "*Andreu* de *Harcla* pur aider & meyn- "tener ſes dreytoures & les droits de "ſa coroune & de ſoun poeple, countre "ſes enemys de touts partz, & nome- "ment countre *Roberet* de *Brus* & ſes "autres enemys *d'Eſtece*, vous fiſt counte "de *Cardoil*, & de ſa meyn vous ſeynt "[*ceynt*] d'Eſpee, & vous dona fee de "la counte, chaſteux, villes, terres & "tenements, pur voſtre eſtat meynte- "ner, come counte; & apres ceo qe "vous avietz tiel honour, & bien fait "reſceu de noſtre dit ſeignour, & eſtes "alez [*alles*] au dit *Robert* de *Brus*, "treitrouſement, fauſement & mal- "veiſement, par eſcrit & par ſerement, "pur meymtener le dit *Robert* d'eſtre "roi *d'Eſcoce*, proprement en la reverſe "de la entencioun le roi, pur quele il "vous fit counte; par quel agarde ceſte "court, qe vous ſoietz degradee, & qe "vous perdetz noun de counte pur vous "& pur vos heires a touts jours, & qe "vous ſoietz deceynt del eſpeye & qe "vos eſporuns d'orrez ſoient coupes de "talouns;

If the king of *England* and the king of *France* be in amity, yet if a ſubject of the king of *England* ſolicits by letters the king of *France* to invade this realm, this is high treaſon: it was the caſe of cardinal *Poole*, who wrote a book to that purpoſe to *Charles* the emperor. *Co. P. C. p.* 14. It is certainly an overt-act to prove treaſon in compaſſing the king's death, but it ſeems not an overt-act to convict him of adhering to the king's enemies, for at the time of this act done the emperor was not an enemy. *Co. P. C. p.* 14.

If an *Engliſhman* during war between the king of *England* and *France* be taken by the *French*, and there ſwear fealty to the king of *France*, if it be done voluntarily, it is an adhering to the king's enemies; but if it be done for fear of his life, and that he returns, as ſoon as he might, to the allegiance

" talouns; & pur ceo qe vous *Andrew*, " homme lige noſtre ſeignour le roi, " countre voſtre homage, foi & ligeaunce, en countre voſtre ſeignour lige, " eſtes alies, tretrouſement, fauſement " & malveiſement, a *Robert* de *Brus*, " enemy mortel a noſtre ſeignour le roi " & de ſoun realme & a ſoun poeple, " par ſerement & par eſcrit, por meyntener au dit *Robert* & a ſes heires " le roialme *d'Eſcoce* enterement, a tut " voſtre force & power, countre toutes " gentz, & qe vous nomerets ſis hommes, & le dit *Robert* autre ſis, les " queux duſze ordeynereint, de toutes " les groſſes beſoignes de roialme *d'Engleterre* & *d'Eſcoce*, & qe lour ordeinement ſe tendroit en tous poyns, " & ſi nul, de quel eſtat ou condicioun " qu'il fuſt, vouſit countredire le dit ordeynement en nul poynt, qe vous ove " toute voſtre force & power, [*lui*] curries ſeur, & en taunte enpreiſtes, " treitrouſement, faucement & malveiſement d'enprendre roial power, countre " voſtre ſeignour lige, les piers & le poeple du roialme, pur eux mettre en " ſubjectioun, & al ordinaunce de vous, " & du dit *Robert*, qi eſt comun enemy " au roy & au roialme, & a ceſte treſoun, fauſme, malveiſte & treitrouſe " aliaunce meyntenir, ſciſtes le poeple " noſtre ſeignour le roi jurer, en attreaunt le dit poeple a vous, taunt come " en vous feuſt, por meyntenir la dite " treſon, fauſme, malveiſte & tretrouſe " aliaunce ſuſdites, les queux ſount " notories & conus en le roialme, & noſtre ſeignour le roi le record de; par " quei agarde ceſte court, qe por la dite " treſoun ſoietz treynes & penduts " & decole, & qe voſtre quer, boueld " & entrayles, dount les treitrouſes penſes vindrent, ſoient aracceez, ars en " poudre, & le poudre ventee; & qe " voſtre corps ſoit cuppee en quatre " quarters, d'ount l'un quarter ſount " [*ſoit*] pendu amount de la tour de *Cardoil*, un autre quarter amount de la " tour de *Novel Chaſtel*, le tertz ſeur le " pount de *Everwyck* & le quartre a " *Salopp*' & voſtre teſte ſeur le pount de " *Lowndres*, por enſcmple qe autres n'enpreignent a faire tieux treſons a lour " ſeignour lige, & dictum eſt vicecomiti " *Cumbriæ* quod faciat inde executionem."

This whole proceeding was returned into chancery upon a *certiorari*, and from thence ſent by *mittimus* into the king's bench there to be inrolled *ad perpetuam rei memoriam*; by this it appears, that it was not a military but deſigned as a judicial ſentence, altho it ſcarce deſerves that name, being throughout irregular and illegal, for that the party was not admitted to a trial, nor indeed had the commiſſioners power to try, their commiſſion being (not *ad audiendum & terminandum* but) only *ad degradandum & ad judicium reddendum & pronunciandum.*

ance of the crown of *England*, this is not an adherence to the king's enemies within this act. *Clauſ.* 7 *E.* 3. *part* 1. *m.* 15. *John Culwin*'s land being ſeiſed upon this account there was *ouſter le main cum exitibus*, "*Quia compertum eſt per inquiſi-*
"*tionem, &c. quod* Johannes *ad fidem & pacem noſtram exti-*
"*tit, quodque idem* Johannes *captus fuit de guerrâ per* Scotos
"*inimicos noſtros, & in priſonâ in* Scotiâ *per dictos inimicos*
"*noſtros, & pro vitâ ſuâ ſalvandâ ad fidem dictorum* Scotorum
"*per dimidium annum extitit, quodque idem* Johannes *poſtea in*
"Angliam *rediit, & ad fidem & pacem noſtram a tempore*
"*predicto hactenus extitit*;" tho this was before 25 *E.* 3. yet the inſtance is uſeful, becauſe adhering to the king's enemies was then treaſon.

If a captain or other officer, that hath the cuſtody of any of the king's caſtles or garriſons, ſhall treacherouſly by combination with the king's enemies, or by bribery or for reward deliver them up, this is adherence to the king's enemies. This was the caſe of *William Weſton* for delivering up the caſtle of *Oughtrewicke*, and *John de Gomeneys* for delivering up the caſtle of *Ardes* in *France*, both which were impeached by the commons, and had judgment of the lords in parliament, *Rot. Par.* 1 *R.* 2. *n.* 40. namely *William Weſton* to be drawn and hanged, but execution was reſpited, *que le roy n'eſt uncore enforme del manner de ceſt judgement*: *Gomeneys*'s judgment was thus, *Les ſeigneurs in plein parlement vous adjudgent a la mort, & pur ceo qu'eſtes gentlehome & banneret & aves ſerve le aiel le roy en ſes guerres, & n'eſtes lige home noſtre ſeigneur le roy, vous ſeres decolle ſans autre juſtyce auer*, but execution was reſpited. (*m*)

And note, tho the charge were treaſon, and poſſibly the proofs might probably amount to it, and *Walſingham ſub anno* 1 *R.* 2. tells us it was done by treaſon; yet the reaſon expreſſed in the judgment againſt *Weſton* is only, *que ſurrendiſts le dit caſtle de* Oughtrewicke *al enemies noſtre ſeigneur le roy avant dits ſans nul dureſſe ou defalt de victualls contre vous ligeance & empriſe*: and the like reaſon is expreſt in the judgment againſt *Gomeneys*, *Vous empriſts a ſauement garder ſans*

les

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(*m*) See theſe caſes *State Tr. Vol.* I. *p.* 193.

les ſurrendy a nully &c. & ore vous Johan *ſans nul dureſce ou defalt de victuals ou de artillery ou autres choſes neceſſaries pur le defence de dits ville & caſtle de* Arde *ſans commandment noſtre ſeigneur le roy malement l'auets delivers & ſurrendres al enemies noſtre ſeigneur le roy per voſtre defalt demeſne contre tous plain de droit & reaſon, & encountre voſtre empriſes ſuiſdits, &c.*

The truth is, if it were delivered up by bribery or treachery, it might be treaſon, but if delivered up upon cowardice or imprudence without any treachery, tho it were an offenſe againſt the laws of war, and the party ſubject to a ſentence of death by martial law, as it once happend in a caſe of the like nature in the late times of trouble (*n*), yet it is not treaſon by the common law, unleſs it was done by treachery; but tho this ſentence was given *in terrorem*, yet it was not executed: it ſeems to be a kind of military ſentence, tho given in parliament, like unto that of the baron of *Grayſtock* governor of *Berwick* (*o*), who travelled into *France* without the king's commandment, and left the care of the garriſon to *Robert de Ogle* a valiant knight, who uſed all imaginable courage in defenſe thereof, but it was loſt in the abſence of the baron of *Grayſtock*, who was thereupon ſentenced to death, becauſe he had undertaken that charge, and yet went from it without the king's command, and in his abſence it was loſt: this alſo ſeems rather a ſentence of council of war, than a judgment of high treaſon; and thus far touching the treaſon of adhering to the king's enemies within the land and without.

Touching the trial of forein treaſon, *viz.* adhering to the king's enemies, as alſo for compaſſing the king's death without the kingdom at this day, the ſtatute of 35 *H.* 8. *cap.* 2. hath ſufficiently provided for it. (*p*) *P.* 13 *Eliz. Dyer* 298, 300.

(*n*) This was the caſe of Col. *Fiennes*, parliament governor of *Briſtol* for cowardly ſurrendring the ſame to the king's forces. See *State Tr. Vol.* I. *p.* 745.

(*o*) See this caſe *State Tr. Vol.* I. *p.* 797.

(*p*) This ſtatute gives power to try ſuch treaſons in the king's bench or by commiſſioners in any county appointed by the commiſſion, and continues in force notwithſtanding 1 & 2 *Ph. & Mar. cap.* 10. which reduces the methods of trial for treaſon to the courſe of the common law, becauſe it is not introductive of a new law, but only ſettles a point, that was before doubtful at common law; and it was accordingly ſo reſolved in *Story's* caſe, *Dyer* 298. *b. Co. P. C. p.* 24.

Story's caſe; but at common law he might have been indicted in any county of *England*, and eſpecially where the offender's lands lie, if he have any. 5 *R.* 2. *Trial* 54.

And it ſeems, if the adhering to the king's enemies were upon the narrow ſeas, this is an adherence to the king's enemies within the realm, and tho it be triable by a ſpecial commiſſion at this day grounded upon the ſtatute of 28 *H.* 8. yet at common law it might have been indicted and tried in any adjacent county by a ſpecial commiſſion of *oyer* and *terminer*, for the narrow ſeas are within the king's alligeance, and part of the realm of *England*. 6 *R.* 3. *Protection* 46. *Co. Lit.* 260.

CHAP. XVI.

Concerning treaſon in counterfeiting the great ſeal *or* privy ſeal.

FIRST, I ſhall upon this article conſider how the common law ſtood before this ſtatute, and what kind of offenſe this was antiently, and how puniſhed. *Secondly*, I ſhall conſider how the law hath been taken touching this offenſe ſince the ſtatute, and how puniſhed.

I. The *great* ſeal of *England* is the great inſtrument, whereby the king diſpenſeth the great acts of his government and the adminiſtration of juſtice; under this ſeal the great commiſſions to his juſtices and others are paſſed; original writs and mandates, and thoſe proceſſes, that iſſue out of chancery, all the king's grants and charters of lands, liberties, franchiſes, honours, pardons are paſſed under this ſeal.

There is or ſhould be always a *memorandum* made upon the cloſe rolls of the breaking of the old ſeal and making and delivering of the new; and by the very delivery of this ſeal the office of keeper of the great ſeal is conſtituted, and moſt ordinarily is to the ſame perſon, that is lord chancellor: ſometimes the cuſtody of the great ſeal is in one perſon, and the office of lord chancellor in another; but always a *memorandum* of the delivery thereof entered upon the cloſe rolls. The great ſeal conſiſts ordinarily of two impreſſions, the one the very great ſeal itſelf with the king's effigies inſtamped on it, the other is commonly called *pes ſigilli*, and ſometimes in our old books called *le targe*, which is the impreſſion of the king's arms in the figure of a target, which is uſed in matters of ſmaller moment as certificates, which are uſually pleaded *ſub pede ſigilli*.

Antiently, when the king travelled into *Normandy*, *France* or other forein kingdoms upon occaſion of war or the like, there were two great ſeals, one went along with the king, the other was left with the *cuſtos regni*, or ſometimes with the chancellor, if he went not along with the king, for the diſpatch of the affairs of the kingdom, and then the king upon his return ſometimes redelivered the old ſeal and took in the new, *Clauſ.* 20 *E.* 3. *part* 2. *m.* 26. *dorſ. Clauſ.* 19 *E.* 3. *part* 2. *m.* 23 & 10. *dorſ. Clauſ.* 20 *E.* 3. *part* 2. *m.* 18. *dorſ. & frequentiſſimè alibi in dorſo clauſorum.*

The *privy* ſeal is ordinarily a warrant for the paſſing of things under the great ſeal, ſometimes a warrant to iſſue treaſure, to make allowances, *&c. vide* 11 *Co. Rep.* 92. the earl of *Devonſhire*'s caſe; and this ſeal is ordinarily in the cuſtody of the lord keeper of the privy ſeal or commiſſioners thereunto appointed.

Beſides theſe ſeals of greater moment there are other ſeals of the king, as the *privy ſignet*, the particular ſeals of the ſeveral courts, that of the *king's bench* and *common pleas* in cuſtody of the chief juſtices of either court, or their clerks appointed for that purpoſe, the ſeal of the *exchequer* in the cuſtody of the chancellor of the exchequer, the ſeal of the duchy of *Lancaſter* in the cuſtody of the chancellor of the duchy

chy, the ſeal of the county palatine of *Lancaſter* in the cuſtody of the chancellor of the county palatine, which are ſometimes in the ſame perſon, the ſeals of county palatine of *Cheſter*, of the ſeveral juſtices of aſſiſe, *oyer* and *terminer* and gaol-delivery, the king's ſeal of ſtatutes and recognizances, the ſeal of the cocket; and for the moſt part theſe ſeals are delivered by the king's order ſignified ſometimes by his privy ſignet, ſometimes by his ſecretaries, but antiently the moſt of them were delivered by the king in perſon to the ſeveral perſons, that had the cuſtody thereof, and a *memorandum* made thereof upon the back of the cloſe roll. *Clauſ.* 43 *E.* 3. *m.* 18. *dorſ.*

The antient manner of delivery of the ſeal for ſtatutes merchant, and probably for other ſeals of like nature was by the king in perſon as before, or by a cloſe writ and *memorandum* under the great ſeal. *T.* 19 *E.* 1. it is commanded, that for the future it ſhould be delivered under the ſeal of the chancellor of the *exchequer.*

The manner antiently of delivering the judicial ſeals of the king's bench and common pleas was by the king or chancellor to the chief juſtices reſpectively, and in like manner the judicial ſeal of the exchequer to the chancellor of the exchequer; theſe were ordinarily in two pieces, *Clauſ.* 43 *E.* 3. *m.* 18. *dorſ.* The profits of the ſeals belonged to the king, except the ſeventh penny, which is the fee of either chief juſtice (*a*); and when the king farmed out the profits of the ſeal

(*a*) The antient fee to the chief juſtice was one penny for every writ, as appears from two of the records here quoted by our author, *viz.* 20 *E.* 3. *Rot.* 87. 22 *E.* 3. *Rot.* 115. the firſt of theſe is a grant to *Walter* of *Yarmouth* of the profits of the ſeals for ten years, in conſideration that the ſaid *Walter* ſhould pay to the clerk of the hanaper for the king's uſe 250 marcs every year, and ſhould likewiſe diſcharge a debt of the king's of 2000 *l.* by the yearly payment of 200 *l.* the ſaid *Walter* to be allowed every year *cents ſolds* for his expenſes in ſealing writs; all writs *ad ſectam regis, &c.* to pay no fees, *Et que les juſtices preignent vn denier du brief por lour ſealx en manere come ad eſte uſe en temps paſſe.*

The latter is a grant of the king (upon his having reſumed the ſeals on account of ſome miſdemeanor committed by *Walter* of *Yarmouth*) to *John de Padebury* and *Henry de Sulibull*, *reddendo inde regi de claro per annum ducentas & quater viginti marcas per manus clerici hanaperii, writs ad ſectam regis, &c.* to pay no fees, *& quod juſtitiarii noſtri in placeis illis percipiant* unum denarium

ſeal of either court, ſometimes one piece remaind with the chief juſtice or his deputy, the other piece remaind with the farmer or his deputy: theſe profits of the ſeals of the courts of the king's bench and common pleas were let for 1000 *l. per annum* (*b*) by the king. *M.* 18 *E.* 3. *Rot.* 35. *Rex. P.* 20 *E.* 3. *Rot.* 87. *T.* 22 *E.* 3. *Rot.* 115. *M.* 23 *E.* 3. *Rot.* 31. *coram rege.* (*c*)

Many times the juſtices iſſued proceſs under their own ſeals unto the ſheriffs: this was complained of *inter petitiones*

de brevi pro ſigillis ſuis, prout ibidem hactenus eſt viſitatum: it ſhould ſeem therefore, as if the perſon employed by our author to conſult the record miſtook the *word* vn in the firſt grant for a *numeral* VII, and that this was the occaſion of his making the ſeventh penny to be the fee of the chief juſtice.

(*b*) Theſe profits were not let for above three or four hundred pounds *per annum*, as appears not only from the above-mentioned caſes, (the higheſt of which is 200 *l.* and 250 marks *per annum*, which is no more than 366 *l.* 13 *s.* 4 *d.*) but alſo from the 18 *E.* 3. *Rot.* 35. where the king ſignifies by writ 20 *Octob.* to his juſtices, that he had granted to *Matthew Canaceon* and his aſſigns *totum proficuum ad ſe de ſigillis omnium brevium judicialium de banco ſuo & banco communi exeuntium pertinens, uſque ad terminum decem annorum, in valorem treſcentarum librarum per annum, de quibus ipſi ſolvent ad opus regis cuſtodi hanaperii cancellariæ quolibet dictorum decem annorum centum libras de exitibus brevium prædictorum, & reſervabunt penes ſe totum proficuum reſiduum de brevibus ſupradictis durante dicto termino in recompenſationem decem* [duo] *millium librarum ſterlingorum, de quibus prædictus* Matthæus *in debitis, in quibus rex certis perſonis in ducatu* Aquitanie *tenebatur, aſſumpſit regem acquietare & exonerare; ita ſemper quod brevia ad ſectam & pro commodo regis per viſum & teſtimonium illorum, qui pro rege proſequuntur, ac brevia pro hominibus de curiis regis, & pauperibus hominibus facta & facienda abſque aliquo inde ſolvendo deliberentur, prout hactenus in cancellaria fieri conſuevit. Et ſciendum quod eodem* 20 *die Octob.* Robertus *de* Sadyngton *Cancellar' domini regis liberavit* Willielmo Scot [*capitali juſtitiario*] *apud* Weſtm' *quoddam ſigillum domini regis pro brevibus prædictis in banco domini regis ſigillandis, cujus unam partem idem* Willielmus Scot *liberavit cuidam* Rogero *de* Merlawe, *deputato dicti* Matthei Canaceon *jurato, aliam verò partem ejuſdem ſigilli penes ſe ipſum retinendo; Et dictum eſt eidem* Rogero, *quòd officio prædicto bene & fideliter intendat ſecundum formam & conditionem in brevi prædicto contentas periculo quod incumbit, &c.*

Altho the conſideration is here ſaid to be the diſcharging a debt of ten thouſand pounds, (which probably led our author to think the profits were let at 1000 *l. per annum*, ſo that in ten years time that debt might be diſcharged) yet the annual produce of the ſeals being no more than 300 *l.* one hundred whereof was to be paid yearly for the king's uſe, it ſeems to me pretty plain, that the king's debt, which he undertook to pay, could be only *two* and not *ten* thouſand pounds; what ſtrengthens this obſervation is, that the indentures of agreement being in *French*, it was very eaſy to miſtake *deux* for *dix*.

(*c*) This was a grant of the ſeals of the king's bench and common pleas to *Anthony Bache* for ſeven years *in recompenſationem ſeptingentarum marcarum* (due to him on an annuity formerly granted) at the rate of 200 *l. per Annum* for the two firſt years of the ſaid term, and 200 marks *per annum* for the five remaining years, the ſaid *Anthony* to pay to the clerk of the hanaper for the king's uſe one [two] hundred marks *per annum* for the two firſt years, and one hundred marks *per annum* for the five remaining years; and the king thereupon ſends his writ *de admittendo prædictum* Antonium *vel ejus attorn' ad officium prædictum modo debito faciendum*; and he was admitted accordingly.

parliamenti 12 *E.* 3. *n.* 6. by the chancellor of the *exchequer* and clerk of the hanaper, as a derogation to the king's profit, and contrary to the duty of the ſheriff, who by his oath is bound to receive no writs, but under the king's ſeal: the anſwer is, *Soit briefe mand' a juſtic' de common banc contenant l'effect de petition, & quils pur lour adviſement facent tiel remedy en lour place, come ils verront, qe ſoit a faire a profit du roy.*

And it ſeems moſt uſual, that ſince that time judicial proceſs not only in thoſe greater courts, but in moſt other courts iſſued under the king's ſeals thereunto deputed, yet juſtices of aſſiſe and gaol-delivery ſometimes make their precepts under their own ſeals: *vide Judicial Regiſter* 34, 35, 41, 43, 73, 84. *vide pur ceo Rot. Parl.* 25 *E.* 3. *n.* 25. a petition that judicial proceſs out of the king's bench and common pleas might iſſue under the ſeal of the chief juſtices, as is uſed in *eyre, aſſiſes, & oyer & terminer*, but denied.

But to return to the buſineſs of the great and privy ſeal.

The great ſeal which *Matthew Paris* (*d*) *ſub anno* 1250. well calls (*clavis regni*) hath been with great care and ſolemnity kept and uſed, and therefore antiently, when there was any change made of the great ſeal, there was not only a *memorandum* made thereof *in dorſo clauſorum cancellariæ*, and a public notification thereof in the court of chancery, but public proclamation was made thereof. *Clauſ.* 1 *E.* 3. *part* 2. *m.* 11. *dorſo.*

Yet in caſes of ſpeed and neceſſity, and ſometimes for diſtinction's ſake the king uſed a private ſeal for ſuch occaſions, which were to be paſſed under the great ſeal.

King *John* died his ſon king *Henry* III. being but about ten years old, from the beginning of his reign until 3 *H.* 3. all grants paſſed under the ſeal of the earl marſhal, that was his protector or guardian, but in the king's name, *viz. In cujus rei teſtimonium has literas noſtras ſigillo comitis mariſcalli rectoris noſtri & regni noſtri ſigillatas, quia nondum ſigillum habuimus, vobis mittimus, teſte* Willielmo *comite mariſcallo.* This ſeal he continued till the third year of his reign, *Clauſ.* 3 *H.* 3.

I *m.* 14.

(*d*) *p.* 783.

m. 14. *hic incepit ſigillum regis currere:* and in the ſame third year, *viz. Pat.* 3 *H.* 3. *m.* 6. there was a proviſion made in parliament for the diſcrimination of thoſe charters, that paſſed during his minority and after his full age, in theſe words: " *Henricus Dei gratiâ, &c.* Sciatis quòd proviſum eſt per " commune conſilium regni noſtri, quòd nullæ cartæ, nullæ " literæ patentes de confirmatione, alienatione, venditione " vel donatione, ſeu de aliqua re, quæ cedere poſſit in perpe- " tuitatem, ſigillentur magno ſigillo noſtro uſque ad ætatem " noſtram completam, *Teſte, &c.*" and after the ſetting down of divers witneſſes are theſe words, " Proviſum eſt etiam per " commune conſilium regni noſtri & coram omnibus præ- " dictis, quòd ſi aliquæ cartæ vel aliquæ literæ patentes factæ " ſecundum aliquam prædictarum formarum ſigillatæ inveni- " antur prædicto ſigillo, irritæ habeantur & inanes, teſtibus " prædictis."

It appears *Clauſ.* 20 *E.* 2. *m.* 3. *dorſ.* in the beginning of that miſerable tragedy, that the 26th of *October* 20 *E.* 3. the king flying from his wife and ſon, who was afterwards king, a great number of lords and others choſe *Edward* the king's eldeſt ſon to be *cuſtos regni*, ſuppoſing the king to be out of the kingdom; at that time the chancellor together with the great ſeal were with the king, and the new *cuſtos regni ea, quæ juris fuerant, ſub ſigillo ſuo privato in cuſtodia domini* Roberti *de* Wyvill *clerici ſui exiſtent', eo quòd aliud ſigillum pro dicto regimine ad tunc non habuit, exercere incepit, poſtmodum vero* 20 *die Novemb. proximè ſequent', captis inimicis prædictis & dicto rege in regnum revertente,* upon a meſſuage ſent to the king for the ſeal the king thereupon ſent the great ſeal to his wife and ſon, *ut non ſolum ea, quæ pro jure & pace eſſent facienda, ſed etiam quæ gratiæ forent, fieri facerent*; the ſeal was brought to them 26 *Novemb.* and the morrow being the feaſt of St. *Andrew* it was opened by the queen and her ſon, and delivered to the biſhop of *Norwich:* and it is to be obſerved, that a parliament was ſummoned between the 26th of *October* and the 26th of *November* in the name of the king, but to be held before the queen and the *cuſtos regni in quindenâ ſancti Andreæ,* which ſummons muſt needs be under his own

own private ſeal; but the 3d of *December* the great ſeal being then in their power it was prorogued unto the morrow of *Epiphany:* the firſt ſummons is recited in the writ of *prorogation*, but it is not entred of *record*, for it was a haſty confuſed buſineſs, neither had they the rolls of the chancery in their hands to make any entry of it; and if they had had them, yet it would have been irregular, and not have amended the matter: all that I ſhall farther add concerning theſe two inſtances is, that neither the ſeal of *William* earl *Marſhal* uſed by *Henry* III. nor the private ſeal of prince *Edward* were great ſeals within this ſtatute, whereof the counterfeiting might be high treaſon.

When the king dies, tho the office of keeper of the great ſeal expires, as well as all commiſſions to ſheriffs and juſtices, yet the great ſeal of the laſt king continues the great ſeal of *England*, till another be made and delivered.

King *Edward* III. began his reign the 25th of *January*, he made the biſhop of *Ely* his chancellor the 28th of *January*, it was not poſſible a new ſeal could be made in that time, and beſides the ſeal was not altered till the 3d of *October eodem anno*, as appears by the proclamation thereof, *Clauſ.* 1 *E.* 3. *part* 2. *m.* 11. *dorſ.* ſo that all that while the old ſeal with the old inſcription ſtood; the method of which alteration was thus: The king by his proclamation bearing *teſte* 3 *Octob. anno* 1. directed to all the chief ſheriffs of *England*, ſignifying, that he had made a new great ſeal, and that it was to take place from the fourth day of that month of *October*, ſends them the impreſſion of the new ſeal in wax, commands them to publiſh it, and that after the fourth day of *October* they ſhould give faith to it, and receive no writs but under the new ſeal after that day.

The fourth of *October* being *Sunday* the biſhop of *Ely* chancellor produceth the new ſeal, declares the king's pleaſure, that it ſhould be from thenceforth uſed; the *monday* after the old ſeal is broken *præcipiente rege*, and the pieces delivered to the Spigurnel. (*e*)

Again,

(*e*) The *Spigurnel* was an officer, whoſe place was to ſeal the king's writs. *Cambd. Remains, p.* 126.

Again, king *Henry* V. died 30 *Auguſti anno ſui ſeptimo*, a parliament was ſummoned by writ bearing *teſte* 29 *Septemb. anno primo H.* 6. to be held *die lunæ ante feſtum Martini*, a commiſſion iſſued to the duke of *Glouceſter* bearing *teſte* 6 *Novemb.* 1 *H.* 6. *ad inchoandum parliamentum, &c.* and the biſhop of *Durham* chancellor to *Henry* V. delivered up the ſeal to the king 28 *Septemb.* The new ſeal with the new inſcription was in that parliament ordered to be made, the biſhop of *Durham* was made chancellor by commiſſion under the great ſeal dated 16 *Novemb.* the new ſeal was not made till ſome time after, therefore the old ſeal of *Henry* V. was uſed in the ſummons of the parliament and all the tranſactions till the new ſeal was delivered: indeed when *Edward* IV. aſſumed the crown, the ſeal of *Henry* VI. was not uſed, for it could not be had, and if it could, yet *Henry* VI. being declared an uſurper, there was no reaſon for *Edward* IV. to give any countenance to that uſurpation by uſing of his ſeal, who was declared an uſurper and attainted of treaſon.

So that (except the laſt caſe of an uſurper) till a new great ſeal be made, the old ſeal, being delivered to the keeper and uſed and employed as the great ſeal, is the great ſeal of *England* within this ſtatute, notwithſtanding the variance in the inſcription, *portraiture*, and other ſubſtantials from the ſtate of the preſent governor.

But then, what ſhall we ſay of the old ſeal, when the new ſeal is made and delivered of record to the keeper, and the old ſeal broken? To this I ſay, 1. It was once the great ſeal of *England*, and therefore the counterfeiting of that ſeal and applying it to an inſtrument of that date, wherein the old ſeal ſtood, or to an inſtrument without date, is high treaſon; nay, if in the time of *Edward* IV. a man ſhould counterfeit the great ſeal of *Henry* VI. and apply it to a patent or other inſtrument of his time, it had been high treaſon, tho *Henry* VI. were an uſurper, and his ſeal in the time of *Edward* IV. of no value. 9 *E.* 4. (*f*)

(*f*) This is *Eager's* caſe, 9 *E.* 4. 1. *b.* where it is ſaid by the counſel, "That "a man ſhall be arraigned in the time "of *E.* 4. for treaſon done againſt *H.* 6. "in compaſſing his death, &c.

But what if in the caſe before inſtanced in after the 4th of *October* 1 *E.* 3. a man had forged a grant by king *Edward* III. (*g*), bearing *teſte* 2 *E.* 3. when the old ſeal was out of date, or in the time of *Edward* IV. had forged a grant by *Edward* IV. and counterfeited the ſeal of *Henry* VI. thereunto; this ſeems not to be a counterfeiting of the great ſeal of *England*, if the difference appear very legible and conſpicuous, for at the time, whereunto it relates, there was no ſuch great ſeal in being; but if the difference between the ſeals be ſuch as be not evident to the view of every man's eye, it may be more doubtful; *ſed vide de hoc infra.*

This ſtatute ſpeaks only of the great ſeal, and privy ſeal, and therefore no other ſeals were within this ſtatute.

But by the ſtatute of 1 *Mar. ſeſſ.* 2. *cap.* 6. "If any do "falſly forge or counterfeit the queen's ſign manual, privy "ſignet or privy ſeal, every ſuch offenſe ſhall be high trea- "ſon, and the offenders herein, their counſellors, procurers, "aiders and abettors being convict according to the courſe of "law ſhall be adjudged traitors againſt the queen, her heirs "and ſucceſſors." But now what ſhall be ſaid concerning theſe other ſeals above-mentiond, as the ſeals for the writs of the courts of king's bench, common pleas, and exchequer, the ſeal for ſtatute-merchant, *&c.*

By the old law, it ſeems that counterfeiting any of the king's ſeals, wherewith writs were ſealed, was petit treaſon, tho it came under the name of *crimen falſi. Glanvil*, that wrote in *Henry* II.'s time, *Lib.* XIV. *cap.* 7. "Di- "ſtinguendum eſt, utrum fuit carta regia an privata, quia "ſi carta regia, tunc is, qui ſuper hoc convincatur (ſcilicet "de falſificatione) condemnandus eſt tanquam de crimine "læſæ majeſtatis; ſi vero fuerit carta privata, tunc cum con- "victo mitius agendum eſt, ſicut in cæteris minoribus crimi- "nibus falſi, in quorum judiciis conſiſtit eorum condemna- "tio in membrorum ſolummodo amiſſione, pro regia tamen "voluntate." *Bracton*, that wrote in the time of *Henry* III. *Lib.* III. *cap.* 3. de *crimine læſæ majeſtatis*, §. 2. "Eſt & aliud

2 "genus

(*g*) This muſt be underſtood under the old ſeal.

" genus criminis læſæ majeſtatis, quod inter graviora nu-
" meratur, quia ultimum inducit ſupplicium & mortis occa-
" ſionem, ſcilicet crimen falſi in quâdam ſui ſpecie, & quod
" tangit coronam ipſius regis, ut ſi aliquis accuſatus fuerit
" vel convictus, quòd ſigillum domini regis falſaverit conſig-
" nando inde cartas vel brevia, vel ſi cartas confecerit & bre-
" via & ſigna appoſuerit adulterina, quo caſu ſi quis inde
" inveniatur culpabilis vel ſeiſitus, ſi warrantum non habue-
" rit, pro voluntate regis judicium ſuſtinebit, &, ſi warrantum
" habuerit & warrantizaverit, liberabitur & tenebitur warran-
" tus:" *Fleta*, that wrote in the time of *E.* 1. *Lib.* I. *cap.* 22. *de crimine falſi*, tells us, " Crimen falſi dicitur, cum quis accuſa-
" tus fuerit, quòd ſigillum regis, vel appellatus, quòd ſigillum
" domini ſui, de cujus familiâ fuerit, falſaverit & brevia inde
" conſignaverit, vel cartam aliquam vel literam ad exhæreda-
" tionem domini vel alterius damnum ſic ſigillaverit, in quibus
" caſibus ſi quis inde convictus fuerit, detractari meruit & ſuſpen-
" di. §. 3. Item crimen falſi dicitur, cum quis illicitus, cui non
" fuerit ad hoc data authoritas, de ſigillo regis rapto vel in-
" vento brevia cartaſve conſignaverit:" *Briton*, that wrote in the time alſo of *E.* 1. *cap.* 4. " Soit inquiſe de touts ceux, qui
" aſcun fauſin averont fait a noſtre ſeale, come de ceux qui
" per engin ont noſtre ſeale pendu a aſcun charter ſauns con-
" ge, ou que noſtre ſeale ount emble ou robbe, ou autre-
" ment troue eient enſele breſs ſauns autre auctorite, and
" *cap.* 8. Graund treſon eſt a fauſer noſtre ſeal, &c."

Upon theſe old books there is no difference made touching the king's ſeals, but generally the crime of treaſon was ſuppoſed in counterfeiting any of them, but moſt certainly the ſtatute of 25 *E.* 3. extends only to the great and privy ſeal, as to the point of treaſon; but then whether that, which was a treaſon before, remain not ſtill a felony at the common law (for all treaſons include felony. 3 *H.* 7. 10. *Co. P. C. p.* 15.) is conſiderable.

M. 2 *H.* 4. *B. R. Rot.* 2. as I take it, *Viſum eſt curiæ, quòd contrafactio ſigilli regis pro recognitionibus eſt niſi felonia* (*b*): but tho

(*b*) There is no ſuch entry to be found either on the ſecond or ſeventh roll of the pleas or crown-roll of that term, but the words cited by our author are in the abſtract

tho they held it not treason, they do not positively affirm it felony since the statute of 25 E. 3. but only *non est nisi felonia, viz.* that at most it can be only felony.

P. 6 E. 2. *B. R. Rot.* 2. Essex. Johannes *de* Bosco *per cur' est culpabilis pro falsitate, eo quòd cepit cultellum suum & calefaciebat eum apud ignem & aperuit breve regis & imposuit aliud fictum, dicit quòd est clericus, & traditur ordinario* Westm' (*i*). *Simile P.* 18 E. 2. *B. R. Rot.* 25 *Rex.* (*k*)

2 It

abstract of the rolls of the king's bench of *Mich.* 2 *H.* 4. *Rot.* 7. but upon what authority is uncertain, being in a different and more modern hand than that of Mr. *Agard*, who in the reign of *James* I. abbreviated the king's bench rolls.

(*i*) The record of this case is thus, "*John de Bosco* was arraigned pro falsitate "figilli & brevis domini regis, eo quod "ivit cum brevi [*de cancellaria*] ad ignem "& calefaciebat cultellum, & cum illo cul-"tello ceram dicti brevis findebat, & amo-"to illo brevi imposuit aliud breve [*this was a* Supersedeas *to the sheriff of* Es-"sex] & illud in eadem cera inclusit & "tradidit servienti suo illud breve vice-"comiti *Essex* deferendum, qui qui-"dem serviens in præsentia prædicti "*Johannis de Bosco* liberavit eidem "vicecomiti falsum breve prædictum: "Dicit quòd clericus est:" upon which he was claimed by the abbot of *Westminster* his ordinary; "Sed ut sciatur "pro quali eidem ordinario liberari de-"beat," a jury *ex officio* pasi upon him, who find him guilty "de prædicta fal-"sitate, findendo cum cultello suo præ-"dicto ceram prædictam & imponendo "falsum breve prædictum, sicut ei supe-"rius imponitur: Ideo inde ad judici-"um, &c. & interim committitur ma-"resch', *&c.*" there is no judgment entred upon the roll; so that from this record, which is not in usual form, it is doubtful whether he had his clergy or not, tho from a jury passing upon him *ex officio* it is most probable he had, but yet it should seem from the case of *Geoffrey de Huntynton* & *Richard de Clynton*, which was but six years afterwards, as if this offense was not so much as felony; they were charged "pro "contrafactione figilli regis & cartæ sub "figillo regis sic contrafacto," which was found in their custody; afterwards they plead the king's pardon "pro omnibus "feloniis & transgressionibus, & quia "inspecta carta prædicta, quæ dicitur "esse contrafacta, compertum est, quòd "carta non est de forma in cancellaria "regis usitata, inspecta etiam cera ejus-"dem cartæ suspectæ compertum est, "quòd cera illa impressa est sigillo re-"gis cancellar', sed prius apposita fuit "cuidam alteri literæ regis patenti, "*quod citius dici potest transgressio, "quam contrafactio.* Et dominus rex "perdonavit eis sectam pacis suæ, quæ "ad ipsum pertinet, de omnimodis fe-"loniis & transgressionibus, &c.——— "jam per tres annos in prisona regis ste-"terint occasione prædicta & non alia "causa, dictum est———quòd delibe-"ret eos, &c. & ipsi eant inde quieti, "&c. Et carta illa cancellatur in cur." *Mich.* 11 *E.* 2. *B. R. Rot.* 156. *Heref.* from hence it appears that the judgment afterwards in *Leake*'s case 4 *Jac.* 1. was agreeable to the antient resolutions.

(*k*) This is the case of *Philip Burden*, but is by no means similar to that of *John de Bosco*, for this was a direct actual counterfeiting of the great seal: *vide infra in notis.* See also another case to this purpose for counterfeiting the privy seal. *Rot. part.* 6 *E.* 2. *part* 2. *m.* 18. "*John de Redynges* was arraigned and "tried coram seneschallo & mareschallo ho-"spitii domini regis pro contrafactione "privati sigilli domini regis, & pro qui-"busdam litteris de prædicto sigillo con-"trofactis [*contrafacto*] consignatis cum "eo inventis," and being found guilty had judgment, "Quòd pro prædicta se-"ductione [*seditione*] sit detractus, & pro "manuopere cum sigillo prædicto posita "suspensus." *vide Ryley's Placita Parlamentaria, p.* 542——545.

It appears not, whether it were a writ under the great ſeal or a judicial writ of ſome court, but whether it were the one or the other, it ſeems to be capital, for he had the benefit of clergy, which in thoſe times was allowable in ſome caſes of treaſon; ſo that it ſeems a counterfeiting of any of the king's ſeals was felony at common law, but whether it ſo continues, notwithſtanding the ſtatute of 25 E. 3. hath degraded it from treaſon, unleſs it be the great or privy ſeal, ſhall be farther examined.

II. Having thus conſidered the ſeals, it remains to conſider what ſhall be ſaid *a counterfeiting* of the great or privy ſeal.

A conſpiracy or compaſſing to counterfeit the great or privy ſeal is not a counterfeiting nor treaſon within this act, for it muſt be an actual counterfeiting. *Co. P. C. p.* 15.

A taking the great ſeal off from a true patent and clapping it on a forged patent in former times hath been held high treaſon; in 40 *Aſſ.* 33. it is plainly held to be high treaſon, (tho my lord *Coke* (*l*) ſaith otherwiſe) for the woman, that did it, could not be let to mainpriſe, which if it had been only a great miſpriſion, ſhe had been bailable upon that indictment. (*m*)

2 *H.* 4. 25. which is entred *H.* 2. *H.* 4. *B. R. Rot.* 16. *Midd. Clement Petiſon*'s caſe, the taking off the true ſeal from one patent and fixing it to a forged patent is adjudged high treaſon; yet the judgment is only *quod diſtrahatur & ſuſpendatur*, which is the judgment in petit treaſon.

This caſe and the reporting of it is diſliked by my lord *Coke*, *P. C. p.* 15. (*n*); but *Stamf. Pl. C. p.* 3. ſeems to agree with this reſolution.

(*l*) *Co. P. C. p.* 15.

(*m*) This argument of our author is very far from being concluſive, for by the ſtatute of *Weſtm.* 1. *cap.* 15. where the offenſe is *open and manifeſt*, (which for what appears was the caſe here) the offender is not bailable, altho it were only a miſpriſion. 2 *Co. Inſt.* 188, 189.

(*n*) And well it might be, for that caſe appears by the record to have been thus: "*Clement Peytenyn* was indicted, "quòd contraſecit magnum ſigillum domini regis falſò & malitioſe & proditorie, & cum dicto ſigillo ſic contrafacto quaſdam literas, quæ præſent' prædict' ſunt conſut', ſigill' i he pleads not guilty, the jury find, quòd quoad contrafactionem ſigilli prædicti idem *Clement* in nullo eſt culpabilis, ſed dicunt, quòd idem *Clement* falſò & deceptorie & in deceptionem populi de aſſenſu aliorum de covina ſua ſcribi fe-"cit,

But the later authorities are againſt it, and that it is only a great miſpriſion and offenſe, but not high treaſon, no nor yet felony, as it ſeems by the book hereafter cited.

37 *H.* 8. *B. Treaſon* 3. A chaplain taking a good ſeal off from an old patent, and fixing it to a forged diſpenſation of non-reſidence no treaſon, but only a great miſpriſion puniſhable by fine and impriſonment.

H. 4 *Jac.* cited by lord *Coke*, *P. C. p.* 16. *Leake's* caſe, who joined two parchments together with glew ſo cloſe, that it could not be diſcerned, and put a label through both, and on the one a true patent granted, which paſſed the ſeal, and then afterwards upon the other parchment wrote a forged patent, then he cut off the true patent and publiſhed the other as a true patent; this was ruled by the advice of all the judges, 1. That this was no counterfeiting of the great ſeal, nor treaſon within this act. 2. But if it had been a counterfeiting of the ſeal, he might have been generally indicted of treaſon for counterfeiting the great ſeal, but it was ruled to be a great miſpriſion or offenſe, but not high treaſon; and with this opinion agrees my lord *Coke*, and it is the ſafer and latter opinion and fit to be followed.

If the patentee of the king of lands under the great ſeal raze the name of one of the manors and make it another name, this is not counterfeiting of the ſeal nor treaſon within this

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" cit, & finxit literas prædictas, & ſuper " literas illas pendi fecit ſigillum mag- " num domini regis, quod antea pende- " bat ſuper aliam magnam patentem do- " mini regis, & ſigillum domini regis " prædictum ſubtiliter & privatè conſui " fecit ſuper literas falſas prædictas, & " illas falſas literas una cum ſigillo do- " mini regis prædicto in diverſis parti- " bus regni *Angliæ* tanquam veras lite- " ras patentes, prout eædem literæ faci- " unt mentionem, uſus eſt & exercebat " in deceptionem domini regis & populi " ſui; propter quod pro eo, quòd cu- " ria non aviſatur, quale judicium præ- " dictus *Clemens* in hac parte ſubire " debeat, remittitur priſonæ mareſch': " Afterwards in the *Eaſter* term next " following, viſo indictamento necnon " veredicto prædictis videtur curiæ hic, " quòd falſæ literæ prædictæ ſic in decep- " tionem domini regis & populi ſui " factæ & ſigillatæ, una cum uſu & ex- " ercitio earundem, *alta proditio* ſunt, " conſideratum eſt, quòd prædictus *Cle-* " *mens Peytenyn* diſtrahatur & ſuſpen- " datur." This muſt be owned to be a very extraordinary caſe, for as lord *Coke* juſtly obſerves, whatever offenſe this were, yet this judgment ought not to have been given upon this verdict, for the jury had expreſly acquitted him of the offenſe charged in the indictment; not to mention, that it is directly contrary to the caſe above-mentiond of *Geoffrey de Huntyngton*; there is likewiſe another irregularity in this caſe, that tho the offenſe was committed after the 25 *E.* 3. and is laid to be done *proditorii*, yet it is not laid to be *contra formam ſtatuti*, as ſince that ſtatute all treaſons ought to be.

this ſtatute, but a great offenſe or miſpriſion, for which the abbot of *Bruer* was ſentenced before the king and his council, and the abbot delivered up the charter to be cancelled. *Clauſ.* 42 *E.* 3. *m.* 8. *dorſ. Co. P. C. p.* 16.

If the chancellor or keeper affix the great ſeal to a charter without warrant, tho this be a miſdemeanor in him, it is not treaſon within this ſtatute, tho *Briton* and *Fleta ubi ſupra* make it treaſon at common law; and altho it ſhould be ſuppoſed treaſon at common law, but not compriſed within the ſtatute, yet it is not now felony; therefore the rule taken 3 *H.* 7. 10. that thoſe treaſons at common law, which are not within the declaration of 25 *E.* 3. yet remain felony, is not true, as might be made appear by many inſtances.

And upon the ſame account it ſeems, that altho by *Fleta* and *Briton*, if a man find caſually the great ſeal, and ſeal a forged charter, this was treaſon at common law; yet it is neither felony nor treaſon at this day, for here is no counterfeiting of the great ſeal, it is therefore only a great miſdemeanor. *Co. P. C. p.* 16.

And altho it ſeems by the old books above cited, that counterfeiting of the judicial ſeal of the king uſed for writs was then treaſon, yet very lately in the king's bench it was ruled to be no felony at this day, but only a great miſdemeanor puniſhable by fine and impriſonment, or by ſtanding in the pillory, or both, ſo that the book of 3 *H.* 7. is not in all points agreeable to law, for many things were treaſon before 25 *E.* 3. which are thereby declared not to be treaſon, and yet remain not felony at this day; and the like for counterfeiting the ſeal of a ſtatute merchant.

If a man grave the ſculpture of the great ſeal without warrant from the king, but never uſe it or apply it to ſeal any thing, this ſeems to be no counterfeiting of the great ſeal, tho it be with deſign and preparatory to ſuch an attempt; for tho in truth the inſtrument itſelf be the ſeal, as appears by the uſual expreſſion *ſigillo meo ſigillat'*, and by the frequent proclamations *de ſigillo amiſſo*, when either the king or a ſubject loſt his ſeal caſually, yet it ſeems not a ſeal within this ſtatute till an impreſſion made in wax in teſtimony

mony of ſome writing, no more than the forging of a ſtamp for money is a counterfeiting of money, unleſs it be uſed, tho in both caſes it is a great miſdemeanor and a great evidence to prove the offenſe committed, if any other circumſtances concur to prove it done.

M. 16 *Jac. B. R.* One counterfeited the draught of a patent to himſelf and others to compound with alehouſe-keepers and uſurers touching their offenſes, and counterfeited the privy ſignet to warrant the paſſing of the other commiſſion ſo by him drawn, and collected divers ſums of money thereby, and for counterfeiting the privy ſignet he was indicted of high treaſon upon the ſtatute of 1 *Mar.* It was reſolved, 1. That the counterfeiting of the great ſeal, privy ſeal, ſign manual, or privy ſignet is at this day high treaſon. 2. That the adding of the crown in the counterfeit ſignet, which was not in the true, and the omiſſion of ſome words in the inſcription, which were in the true ſignet, and the inſerting other words, which were not in the true, (which was done purpoſely, that there might be a difference between the true ſignet and the counterfeit) alters not the caſe, but it is high treaſon, for the fixing of the counterfeit ſignet, and thereby obtaining the great ſeal to his feigned patent, and thereby publiſhing it to be true, and collecting ſums of money by it make it treaſon; the offender had judgment to be drawn, hanged and quartered. (*o*)

So that it ſhould ſeem, that tho there might be ſo great a diſparity between the true and counterfeit ſignet, that the bare affixing of ſuch a ſeal might not be a counterfeiting within the ſtatute; yet if it were ſo like, that it deceived the officers of the great ſeal, and was uſed to that purpoſe, and attained its effect, *viz.* the affixing of the great ſeal to the forged commiſſion, it was a ſufficient counterfeiting to bring him within this law of 1 *Mar.*

The like *mutatis mutandis* may be applied to the great or privy ſeal.

(*o*) This caſe is reported in 2 *Rol. Rep.* 50. by the name of *Robinſon's* caſe.

If a man counterfeit the ſtamp of the great ſeal, and deliver it to *B.* to uſe, *B.* being ignorant that it is a counterfeit ſtamp, but thinking it true, ſeals a writ or commiſſion, this ſeems not to be treaſon in *B.* becauſe he did it not *proditorie*, but it ſeems to be treaſon in the deliverer, if he deliverd it to that purpoſe, for he did it *proditorie*, but the other not.

III. I come in the laſt place to conſider the judgment in the caſe of counterfeiting of the ſeal, whether it be only to be drawn and hanged, as in the caſe of counterfeiting money, or to be drawn, hanged, beheaded, *&c.* as in the caſe of compaſſing the king's death, levying of war or adhering to the king's enemies.

It ſeems that at the common law this offenſe was felony or treaſon at the king's election, if the indictment ran only *felonicè* it was only felony, if *proditorie* it was treaſon. (*p*)

But altho it were *proditorie* and ſo applied to treaſon, it was not a treaſon of ſo deep a die, as that of compaſſing the king's death, adhering to the king's enemies, or levying war, which ſtrikes at the head, and therefore in compariſon thereof it was a kind of petit treaſon.

Clauſ. 6 Johan. M. 12. *dorſ.* "Scias quòd dedimus *Adæ* de "*Eſſex* clerico noſtro pro ſervitio ſuo omnia terras, tene"menta & jura, quæ fuerunt *Willielmi* de *Strubby*, cujus terræ "& tenementa ſunt eſchaeta noſtra per feloniam, quam "fecit de falſificatione ſigilli noſtri." *Et nota* the king had the eſcheat, yet the offenſe was ſtyled felony.

At the parliament 18 *E.* 1. *Co. P. C. p.* 16. Clergy was allowed to a man convict *pro falſificatione ſigilli regis, deliberabatur ordinario* (*q*), but *in tali caſu non admittenda eſt purgatio*;

(*p*) *Co. P. C. p.* 15.

(*q*) This is confirmed by *Philip Burdon's* caſe, (*P.* 18 *E.* 2. *B. R. Rot.* 25. *Rex. South'*) who together with *Richard de Bourne* was indicted, *Quòd nequiter & ſeditioſè contrafecit ſigillum de metallo ad modum magni ſigilli regis, de quo quidem ſigillo contrafacto diverſa brevia quamplurima conſignavit*; he pleads, *quòd clericus eſt*, the jury find him guilty *de felonia & ſeditione predictis ei impoſitis*, and he was thereupon deliverd to his ordinary, *tanquam clericus convictus*; from hence it appears that at common law clergy was allowed in caſes of treaſon, where it was not immediately againſt the king's perſon.

and yet in these greater cases of treason of levying war or compassing the king's death clergy was not allowed at common law. *T.* 21 *E.* 3. *B. R. Rot.* 23. *Rex.* (*r*)

M. 1 *E.* 3. *Charter de Pardon* 13. (*s*). A man arraigned for counterfeiting the king's seal pleaded a charter of pardon of all felonies, and it was allowed; yet there it is agreed, that the judgment for such an offense is, that he shall be drawn and hanged, but such a pardon will not serve in such a case since the statute of 25 *E.* 3.

Trin. 10 *E.* 2. *Rot.* 132. *B. R. Bucks.* "*Robertus Legat* & "*Johannes Salcock* per ballivos coram rege ducti ad respon- "dendum domino regi de hoc, quod ipsi cum aliis ignotis "in pleno mercato villæ de *Olneye*, cum quadam falsa com- "missione & ficta cum quodam sigillo regis contrafacto sig- "nata, quam ballivi in curia regis hic portexerunt, asse- "rentes illam super eos inveniri die, quo attachiati fuerunt, "& dicentes, quòd virtute illius commissionis prisas fecerunt "ad opus domini regis, usque ad summam sexaginta bestia- "rum, de quibus quatuor bestiæ inventæ fuerunt in eorum "possessione & cum eis hic ductæ; they both plead not "guilty; the jury find *John Salcok* guilty de falsitatibus & fe- "loniis prædictis, judgment given against him pro falsitate "sigilli regis & commissione prædictis quod detrahattur & "pro furtiva abductione prædictarum bestiarum suspen- "datur."

Nota,

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(*r*) That case was thus, *Peter de Thorpe* son of *John de Thorpe* was indicted, and afterwards outlawed *anno* 18 *E.* 3. *pro diversis feloniis & seditionibus*, viz. going to little *Yarmouth* and *Gorleston cum tribus vexillis extensis in modum guerræ*, breaking open houses there, feloniously taking away goods there, &c. and also five ships, "Quæ præparatæ erant de "victualibus & aliis necessariis eundi "cum domino rege in guerra sua, &c. "Afterwards coram rege quæsitum est "a præfato *Petro*, si quid pro se habeat "vel dicere sciat, quare ad executionem "judicii de eo super utlagaria prædicta "procedi non debeat, &c. Qui dicit, "quòd clericus est & membrum sacræ "ecclesiæ, &c. Et quæsitum est sæpius "ab eo, si quid aliud velit dicere pro "rèsponsione in retardationem judicii, "&c. Qui dicit, ut prius, & nihil a- "liud respondet, &c. Et inspectis in- "dictamentis prædictis, & etiam recor- "do & processu utlagar' prædictæ mani- "festè compertum est in eisdem, quòd "utlagar' prædicta super articulo *sedi- "tionis* promulgatur, in quo casu præ- "dictus *Petrus* privilegio clericali gau- "dere non potest secundum legem & "consuetudinem regni, &c. Ideo idem "*Petrus* distrahatur & suspendatur, &c.

(*s*) 1 *E.* 3. 23. *b.*

Nota, an arraignment of treaſon without indictment upon the *mainouer* (*t*) found upon them: *vide P.* 21 *E.* 3. *B. R. Rot.* 46. *Midd' Rex.*

According to the old books above-mentiond, *Fleta, &c. ubi ſupra, diſtrahi debet & ſuſpendi*; and ſo it was practiſed in the caſe of 2 *H.* 4. above-mentiond, where the judgment is only *diſtrahi & ſuſpendi.*

And it may be reaſonably argued, that as in the caſe of counterfeiting the king's coin, which was a treaſon at common law, tho it be ſo declared by the ſtatute of 25 *E.* 3. yet the judgment, that was at common law, which was only to be drawn and hanged is not altered by that ſtatute. *M.* 10 *Car. B. R. Morgan*'s caſe (*u*): ſo in caſe of counterfeiting the ſeal; but at this day the law is generally held, that for counterfeiting of the great or privy ſeal, or of the privy ſignet or ſign manual, the judgment is to be hanged, beheaded and quartered, as in other high treaſons, and ſo was the judgment in the caſe of 16 *Jac.* above-mentiond; and it is ſafeſt to follow the modern practice in judgments of high treaſon, tho I think it no error, if the judgment be only, *quòd diſtrahatur & ſuſpendatur*, according to the antient precedents, becauſe the judgment is ſtill capital, and tho it be leſs, than the higheſt judgment in treaſon, yet it is ſtill included in it.

CHAP.

(*t*) See for this kind of arraignment, 7 *H.* 4. 43. *b. S. P. C.* 148. *c.* 2 *Co. Inſt.* 188. (*u*) *Cro. Car.* 383.

CHAP. XVII.

Concerning high treaſon in counterfeiting the king's coin, *and in the firſt place touching the hiſtory* of the coin and coinage *of* England.

THE Legitimation of money and the giving it its denominated value is juſtly reckond *inter jura majeſtatis*, and in *England* it is one ſpecial part of the king's prerogative.

Before I enter into the particulars concerning money I will give a hiſtory or narrative of the various ſtates and conditions and changes of money in the ſeveral ages of this kingdom, and then ſhall deſcend to ſome more particular obſervations, which will be uſeful in this buſineſs.

Money is the common meaſure of all commerce almoſt through the world; it conſiſts principally of three parts; 1. The material, whereof it is made. 2. The denomination or extrinſic value. 3. The impreſſion or ſtamp.

I. The material in *England* is either pure ſilver, or pure gold, whereof poſſibly ſome money was antiently made here in *England*, or elſe ſilver or gold mixed with an allay, which was uſually and is hitherto a ſmall proportion of copper.

The ſtandard of the money of *England*, that hath for many ages obtaind, is that, which is commonly called *Sterling* (*a*) gold or *Sterling* ſilver, for tho the denomination of *Sterling* was at firſt applied to the coin of ſilver and to that coin,

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(*a*) Some imagine this word to come from the town of *Sterling* in *Scotland*, where they pretend the pureſt money was formerly made; others that it is derived from the *Saxon* word *Steore*, which ſignifies rule or ſtandard; others that it was taken from ſome *Flemiſh* workmen, who in the reign of king *John* were invited over to reduce the money to its proper fineneſs; the people of that country being generally called *Eaſterlings*.

coin, which was the penny commonly called *Sterlingus*, yet uſe hath made it applicable not only to all kind of *Engliſh* coin of ſilver, but alſo to coin of gold, and this is called the ſtandard of coin.

But before this can be well underſtood, we muſt make ſome digreſſion touching the meaſures applicable to theſe materials.

In ſilver the meaſure or weights applicable thereunto are principally theſe:

1. The pound, which being not *averdupois*, but *troy* weight conſiſts of twelve ounces.

2. The ounce conſiſting of twenty penny weight.

3. The penny or *Sterling* conſiſting of thirty-two grains of wheat taken out of the middle of the ear.

This is the old *compoſitio menſurarium* ſettled in the time of *E.* 1. (*b*) *viz. quòd denarius* Angliæ, *qui denominatur* Sterlingus *rotundus, ſine tonſura ponderabit triginta duo grana frumenti medio ſpicæ, & viginti denarii faciunt unciam, & duodecim unciæ faciunt libram, & octo libræ faciunt gallonem, & octo gallones buſſellum.* (*c*)

And it is to be remembred, that at that time a penny did really weigh the twentieth part of an ounce of ſilver, and twenty pennies did really weigh an ounce of ſilver, and two hundred and forty pence did really amount to a pound weight troy, and to twenty ſhillings, which made a pound of ſilver coin.

And altho at this time the coin is raiſed, and therefore varies from what it was at that time, yet to this day twenty ſhillings in ſilver is called a pound, and the meaſure of an ounce is by twenty penny weights according to the old proportion; but indeed the grain is changed (*), for whereas thirty [two] grains of corn then made an ounce [a penny weight], yet becauſe the weight of corn is not always uniform, and

(*b*) An old leiger book of the abbey of St. *Edmundsbury* ſays the affair was thus ſettled in 3 *E.* 1. by *George Rockley* then mayor of *London* and maſter of the mint; and in the 28 *E.* 1. an indented trial-piece of the goodneſs of old *Sterling* was lodged in the exchequer, and every pound weight troy of ſuch ſilver was to be ſhorn at twenty ſhillings and three pence. See *Tindal*'s note on *Rapin*'s hiſtory *ſub fine Ed.* 1.

(*c*) *Vide* ſtatute 31 *E.* 1. 2 *Co. Inſtit.* 577.

(*) There being, as I apprehend, two or three miſtakes in this paragraph, I was not willing to vary from the original *MS.* but have inſerted in brackets what I think was intended.

the number of thirty [two] was not ſo ready and eaſy for computation; the penny weight is now divided into twenty-four equal parts, which are commonly in the buſineſs of the mint called grains.

But touching the meaſure of gold there is ſome difference in relation to coin from that of ſilver, for we are told by the *liber ruber ſcaccarii* in that large tract concerning money, that the pound of gold conſiſts of twenty-four carets, every caret weighing half an ounce of ſilver, and every caret conſiſting of four grains; and conſequently every grain of gold would weigh ſixty of thoſe grains, which we call grains of ſilver, *viz.* the artificial grains, whereof twenty-four made the penny weight. (*d*)

Now the *Sterling* ſtandard was antiently, as it ſeems, ſomewhat different from the ſtandard as it is at this day, and for ſome hundred of years before; for from the 46th year of *Edward* III. and for ſome time before until this day the ſtandard of *Sterling* ſilver hath been and is this, *viz.* every pound of *Sterling* ſilver hath eleven ounces two-penny weight of fine ſilver, and eighteen penny weight of copper, which makes the allay of *Sterling*; but becauſe there cannot be ſo exact an obſervation of the proportion, a half-penny weight of copper over or under is allowed for the remedy, which is the cauſe that Sir *John Davis* in the caſe of mixt monies, *fol.* 24. *b.* ſaith, that eighteen ſhillings and five pence half-penny *argenti puriſſimi continentur in quâlibet libra, & quelibet libra de* Sterling *money avoit* 18 *d. ob. de allay de coper, & nient pluis.*

But before that time it appears by the red book in the exchequer, (which was written before 46 *E.* 3. and after 23 *E.* 3.) the ſtandard of *Sterling* ſilver conſiſted of eleven ounces four penny weight of fine ſilver, and ſixteen penny weight of copper, ſo that then the ſtandard was purer; and poſſibly by what follows it may appear, that in the time of *Henry* II. the ſtandard was purer, than that, for then there was allowed only twelve-pence upon the pound of ſilver *dealbare firmam* (*e*), which poſſibly might be to reduce it to fine ſilver, but this is obſcure; *de hoc poſtea.* The

(*d*) If 1 caret=4 grains=$\frac{1}{2}$ ounce=10 penny weight, then $\frac{1}{4}$ caret=1 grain=$\frac{2}{24}$ penny weight=60 grains of ſilver.

(*e*) *Mat. Paris* 747.

The ſtandard of *Sterling* gold in the latter end of E. 3. (*f*) was, that a pound of *Sterling* gold conſiſted of twenty-three carets, three grains and a half of pure gold, and a half grain of allay of copper, and thus I think it continues to this day; and by this we may underſtand the ſtatute of 17 *E.* 4. *cap.* 1. and 4 *H.* 7. *cap.* 2. by the former it is provided, that no goldſmith ſell any gold under the fineneſs of eighteen carets, nor ſilver under the allay of *Sterling*; by the latter, that all ſilver, that ſhall be fined or parted, be made ſo fine, that it may bear twelve penny weight of allay in a pound weight, and yet be ſo good or better than *Sterling*.

And this is the dignity of the coin of *England*, that it hath been generally of the allay of *Sterling*, (except ſome ſmall interruptions, whereof hereafter) and according to this it was enacted 25 *E.* 3. *cap.* 13. that the money of gold and ſilver, which now runneth, ſhall not be impaired in weight or allay, but as ſoon as a good way may be found, the ſame be put into the antient ſtate, as in the *Sterling* made upon the petition of the commons. *Rot. Par.* 25 *E.* 3. *n.* 32.

II. As to the ſecond eſſential of coin it is the denominated or extrinſic value, which is and of right ought to be given by the king, as his unqueſtionable prerogative (*g*), and that is ſeen in theſe particulars.

1. In the firſt inſtitution of any coin within this kingdom he, and he alone ſets the weight, the allay, the denominated value of all coin; this is done commonly by indenture between the king and the maſter of the mint; *de quo poſtea.*

And tho by ſpecial charter or uſage divers prelates and monaſteries in *England* had a certain number of ſtamps for the coinage of money, as the abbot of St. *Edmundsbury*, *Clauſ.* 32 *H.* 3. *m.* 15. *dorſ.* the archbiſhop of *York*, *Clauſ.* 5 *E.* 3. *part.* 1. *m.* 19. and likewiſe the archbiſhop of *Canterbury*, the biſhop of *Durham*, the biſhop of *Chicheſter*, *&c. de quibus vide* ſtatute 14 *&* 15 *H.* 8. *cap.* 12. yet they had only the profit of the coinage, and the reſidence of ſome coiners at their cities, but they had not the power of inſtituting either the allay, the denomination, or the ſtamp; the ſtamps were uſually

(*f*) See *Tindal's* note on *Rapin's* hiſtory *ſub fine Ed.* 3. (*g*) *Plo. Com.* 316.

uſually ſent them by the treaſurer and barons of the exchequer by the king's command under his great ſeal, and the maſters or chief officers imployed therein were ſworn to the king for the juſt execution of their places. *Clauſ.* 5 *E.* 3. *part.* 1. *m.* 10 & 19.

But thoſe mints have been long diſuſed, tho it ſhould ſeem by the ſtatute of 14 *H.* 8. *cap.* 12. above-mentiond, that the ſeveral ſtatutes made againſt exchange of money, other than at the king's exchanges, were not intended to prejudice theſe particular franchiſes of coinage.

2. He may by his proclamation legitimate forein coin, and make it current money of this kingdom according to the value impoſed by ſuch proclamation; but the counterfeiting of ſuch money was not treaſon, till the ſtatute of 1 *Mar. cap.* 6. made it ſo, nor the clipping, waſhing, impairing thereof was not treaſon till 5 *Eliz. cap.* 11. and 18 *Eliz. cap.* 1. but all theſe ſtatutes allow the power of legitimation thereof to the king by proclamation. (*b*)

3. He may inhanſe the external denomination of any coin already eſtabliſhed by his proclamation, and thus it hath been gradually done almoſt in all ages, as will appear by what follows in this chapter; this is ſometimes called imbaſing of coin and ſometimes inhanſing it, and it is both, it is an inhanſing of coin in reſpect of the extrinſic value or denomination, but an imbaſing in regard of the intrinſic value; as for inſtance, when in the time of *E.* 4. a noble was raiſed to a higher rate by twenty pence; *vide* 9 *E.* 4. 49.

4. He may by his prerogative imbaſe the ſpecies or material of the coin, and yet keep it up in the ſame denominated or extrinſic value as before, namely to mix the ſpecies of money with an allay below the ſtandard of *Sterling*; this is the caſe of mixt monies in Sir *John Davis*'s reports, where the caſe was this.

(*b*) See alſo 8 & 9 *W.* 3. *cap.* 25. and 7 *Ann. cap.* 25. whereby it is high treaſon knowingly to make, mend, buy, ſell, or have in poſſeſſion any mould or preſs for coining, or to convey ſuch inſtruments out of the king's mint, or mark on the edges any coin *current*, or to counterfeit, or colour or gild any coin reſembling the *current* coin of the kingdom.

April, 43 *Eliz. Brett* bought wares of one *Gilbert* a merchant in *London*, and became bound to him in 200 *l.* conditiond for the payment of one hundred pound *Sterling* current and lawful money of *England* in *September* following at *Dublin* in *Ireland*: 24 *May*, 43 *Eliz.* the queen ſent into *Ireland* certain mixt money from the tower of *London* with the uſual ſtamp and inſcription, and declared by her proclamation, that it ſhould be lawful and current money of *Ireland*, *viz.* a ſhilling for a ſhilling, and ſix-pence for ſix-pence, and that accordingly it ſhould paſs in payment, and none to refuſe, and declared that from the 10th of *July* next all other money ſhould be decried and eſteemed only as bullion and not current money. Upon the day of payment *Brett* tendred the 100 *l.* in this mixt money, and reſolved upon great conſideration, that this tender was good, the place of payment being in *Ireland*, and the day of payment happening after the proclamation made; that altho this were not in truth *Sterling*, but of a baſer allay, nor a money current in *England* by the proclamation, yet the payment being to be made in *Ireland*, it was as to that purpoſe current money of *England*; but if the day had been paſſed before the proclamation, then he muſt have anſwerd the value, as it was when the payment was to have been made. Sir *John Davis*'s reports, *caſe de mixt moneys.* (*i*)

It is true, that the imbaſing of money in point of allay hath not been very uſually practiſed in *England*, and it would be a diſhonour to the nation, if it ſhould, neither is it ſafe to be attempted without parliamentary advice; but ſurely if we reſpect the right of the thing, it is within the king's power to do it; for tho the ſtatute of 25 *E.* 3. *cap.* 13. above-mentiond be againſt it, yet the ſtatute doth not abſolutely forbid it; and altho by *Poyning*'s law 10 *H.* 7. all the precedent ſtatutes in *England* are of force in *Ireland*, yet that reſolution was given as above.

My lord *Coke* in his comment of *Articuli ſuper cartas*, *cap.* 20. ſeems to imply, that the alteration of money in weight or allay may not be without act of parliament, and for that

(*i*) *Davis Rep.* 18.

purpoſe cites the Mirror of juſtices (*k*), *Ordein fuit, qe nul roy de ce realme ne poit changer ſa money ne impayre, ne amender, ne autre money faire, qe de ore ou de argent ſans aſſent de tous ſes counties*; and the act of 25 *E.* 3. *cap.* 13. the ſtatute of 9 *H.* 5. *ſeſſ.* 2. *cap.* 6. that all money of gold and ſilver ſhall be as good weight and allay as is now made at the *Tower*: the parliament-roll of 17 *E.* 3. *n.* 15. (*l*), which was an accord in parliament for the preſent amendment and increaſe of coin *de fayre une mony des bones* Eſterlinges *en* Engleterre *du poys & allay del auntient* Eſterlinges, *qe averà ſon courſe in* Engleterre *enter les graunts & commons de la terre*, which ſhould not be exported; and if thoſe of *Flanders* would make money of as good an allay as *Eſterlinges*, that it ſhould be current between merchant and merchant here and others, that would receive it, which was a temporary proviſion for the increaſe of money.

All that a man can conclude upon theſe is, that it is neither ſafe nor honourable for the king to imbaſe his coin below *Sterling*, if it be at any time done, it is fit to be done by aſſent of parliament, but certainly all that it concludes is, that *fieri non debuit*, but *factum valet*, and this appears,

1. By that reſolution in the caſe of mixt monies, which, tho it were but by way of advice and in *Ireland*, is of great weight, eſpecially if we conſider the conſonancy thereof to the practice in *Ireland*, which tho it hath the ſame law of 25 *E.* 3. in force there, yet generally their coin current there was of a baſer allay than *Sterling*, even before the proclamation of 43 *Eliz.*

2. By the uſual inhanſing of the coin in point of value and denomination here, which tho it be not abſolutely an imbaſement of the coin in the ſpecies, yet it hath very near the ſame effect.

3. By the attempts that have been made to reſtrain the change of coin without conſent of parliament. Among thoſe many proviſions by the lords ordeiners, 5 *E.* 2. *n.* 30. that much abridged the king's power, this was one, *pur ceo qe a touts les foys qe le change de mony ſe fait en royalme, tout le peo-*

2 *ple*

(*k*) *cap.* 1. §. 3. (*l*) See *Co. P. C. p.* 93.

ple eſt grandment grievez in molts des maniers, nous ordeinams, qe quant meſtier ſerra & le roye voile exchange faire, qil la face par common councell de ſon baronage & ceo en parlement.

But theſe ordinances, and this among the reſt was repeald in parliament *E.* 2. and never revived again.

Rot. Par. 20 *E.* 3. *n.* 17. "Item qe les receivers des payments noſtre ſeigneur le roy receuent de people en cheſcun place auxi bien or come argent al priſe aſſiſe deſicom le people eſt arte de cel receiver pur payment, & qe la change de mony de or ne dargent ne ſe face ſans aſſent de parlement. Ro'. Quant aprimer point de c'article ſoyt tenus; quant a les changes fair ſoit l'article monſtre a noſtre ſeigneur le roy, & as graunts qe ſont perdervers lui, qils ent ordeignent & dient lour volunte.

King *Henry* VIII. imbaſed the coin of this kingdom in point of allay, and ſo it continued during the reſidue of his reign, and during the reigns of *Edward* VI. and queen *Mary*, in ſo much that the penny had not above a half-penny of intrinſic value; but queen *Elizabeth* among the reſt of her excellent methods of government did by little and little rectify this deteſtable imbaſement of coin, 1. By prohibiting exportation, and melting down of good ſilver. 2. By reducing the braſs money to its intrinſic value. 3. By making a good allowance (to her own loſs) of the baſe money brought into the mint. 4. By ſtamping of new money of juſt allay of *Sterling*: *Camd. Eliz. ſub anno* 1560. *p.* 48.

While I wrote this a proclamation hath iſſued dated 16 *Aug.* 1672. whereby copper coin of half-pence and farthings near the intrinſic value is proclaimed in theſe words: "We do by this our royal proclamation declare, publiſh and authorize the ſaid half-pence and farthings of copper ſo coined, and to be coined, to be current money, and that the ſame from and after the 16th of *Aug.* ſhall paſs and be received in all payments, bargains and exchanges to be made between our ſubjects, which ſhall be under the value of ſix-pence, and not otherwiſe nor in any other manner;" how far this makes it current money, *videbimus infra.*

And

And thus far touching the power of denomination, or ſetting the extrinſic value upon coin; the manner how this is done will be ſhewn hereafter.

III. The *third* eſſential in coin is the ſtamp or impreſſion, for tho it may be poſſible, as Mr. *Stowe* ſays, that in antient time money paſſed in *England* without a ſtamp or impreſſion, yet I never read any ſuch thing ſince the conqueſt, for that, which is frequently called blank money, was not money without impreſſion, but white money or pure ſilver, or at leaſt *Sterling* ſilver coined, for otherwiſe it had not been an apt meaſure for commerce: the ſtamps or impreſſions of current money were heretofore deliverd to the maſter of the mint from the exchequer, but of later times they are deliverd by the ſecretary ſometimes with, ſometimes without the indenture of coinage: now touching the manner of the legitimation of coin in *England*, it is ſometimes by proclamation, but always by indenture between the king and the maſter of the mint.

And therefore where Sir *John Davis* in the caſe *ubi ſupra* (*m*) makes theſe ſix things as eſſentials to the legitimation of coin, 1. Weight. 2. Fineneſs. 3. Impreſſion. 4. Denomination. 5. Authority of the prince. 6. Proclamation. The laſt is not always neceſſary to the legitimation of coin, for there is ſcarce any king's reign, but that there are various ſtamps or impreſſions of money, which were never proclaimed, and therefore if upon an indictment of clipping or counterfeiting the king's coin it be queſtioned, whether it be the king's coin or no upon the evidence, there is not a neceſſity of proof thereof by a proclamation, but it is a meer queſtion of fact, which muſt be left upon the jury by circumſtances of fact to find, whether it be the king's money; for tho there might be poſſibly proclamation of ſome new coins in the beginning of kings reigns, yet it would be impoſſible to prove them in the antient coins of *Edward* VI. queen *Mary*, queen *Elizabeth*, *&c.* but if neceſſary to be ſuppoſed, they may be preſumed *ex diuturnitate temporis*; the moſt therefore that can be expected is to produce the officers of the mint

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(*m*) 19. *b.*

mint or their indenture to prove a coin current, if it be not otherwiſe commonly known.

But proclamation is neceſſary in theſe caſes following.

1. A proclamation with a proclamation-writ under the great ſeal is neceſſary to legitimate and make current forein coin, and without the proclamation it is neither current coin of this kingdom, nor is the counterfeiting, clipping or diminiſhing thereof treaſon within the ſtatute of 1 *Mar.* or 5 or 18 *Eliz.* for the words in theſe ſtatutes (*and by proclamation allowed and ſuffered to be current here*) refers only to forein coin, not to the coin of this kingdom; but tho it be not proclaimed, it is miſpriſion of treaſon to counterfeit it by the ſtatute of 14 *Eliz. cap.* 1.

The reaſon is eſpecially becauſe by the ſtatute of 17 *R.* 2. *cap.* 1. no forein coin of gold or ſilver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into *Engliſh* coin.

2. A proclamation under the great ſeal is neceſſary to legitimate baſe coin or mixt below the ſtandard of *Sterling*, and for the diſpenſing within the ſtatute of 25 *E.* 3. *cap.* 13. and 4 *H.* 5. *cap.* 6. and with application to that caſe the opinion of Sir *John Davis*'s report touching the neceſſity of a proclamation ſeems to be good in law.

3. A proclamation under the great ſeal is neceſſary, when any coin already in being is inhanſed to a higher denomination or extrinſic value; as when the twenty ſhillings piece of gold was raiſed to twenty-two ſhillings, becauſe it was once current money under another denomination; thus it was done upon the inhanſing of twenty ſhillings and ten ſhillings pieces by king *James.*

4. A proclamation is neceſſary when any money, that is current in uſage or payment, is decried; thus it was done in the caſe of 43 *Eliz.* for the *Sterling* money in *Ireland* before mentiond; and thus it was done by the *Pollards* and *Crocards tempore E.* 1. (*n*), *Dy.* 82. and by the ſeveral baſe monies mentiond in *Articuli de moneta*, namely the money with the mi-

(*n*) *Davis* 21. *b.* See the note in *Rapin*'s hiſt. *ſub fine Ed.* 1.

tre and with the lyons, which it ſeems were minted in *England*, beſides the other forein money therein mentiond. (*o*)

5. Altho in the caſe of money newly coined by the king's authority in *England* a proclamation is not abſolutely neceſſary to the legitimation thereof or making it current, yet to induce a contempt upon ſuch as refuſe to take it in payment ſuch proclamations have not been altogether unuſual, and by the red book of the exchequer ſeems neceſſary for that purpoſe; for how can men reaſonably know at firſt, whether this be the king's coin without ſome ſuch public notification, where long uſe and cuſtom hath not made the ſtamp or coin familiarly known to thoſe, that are to receive it: *vide* proclamations for money newly made principally upon this account, *Clauſ.* 18 *E.* 3. *part* 1. *m.* 28 & 12. *dorſ. Clauſ.* 18 *E.* 3. *part* 2. *m.* 14. *dorſ. Clauſ.* 19 *E.* 3. *part* 1. *m.* 23. & *part* 2. *m.* 15. *dorſ. Clauſ.* 20 *E.* 3. *part* 2. *m.* 20. *dorſ.* and 25 *E.* 3. *m.* 14. *dorſ.* But yet the money is the lawful money of *England*, and he that counterfeits it is within the law of 25 *E.* 3. for treaſon, tho there be no ſuch proclamation: *vide Lib. Rubr. Scaccarii, fol.* 259. "Imprimis oportet ut omnem monetam "præcedat conſtructio allaii, viz. ponderiſque & numeri ip-"ſius monetæ diſtincte & apte continens moderamen, deinde "inchoanda eſt & perficienda ex edicto aut licentiâ principis "ſpeciali, & publicanda per proclamationem præconis ipſius "principis publice, ut mos exigit faciendum, & tunc uſui "apta erit: ita ut ex tunc non ſit impune a quoquam de "populo recuſanda. Quicunque autem clam vel aperte vel "palam abſque licentiâ principis cujuſcunque monetæ contra-"factionem attemptâſſe convictus fuerit, corporaliter plecti "ſolet."

And now I ſhall give a brief hiſtory of the variation of the coin of *England*.

It appears by all the antient monuments, that I have ſeen, that the uſe of coin or money was antient and long before the conqueſt. (*p*) It

(*o*) And thus it was lately done in the caſe of the broad pieces of twenty-five ſhillings and twenty-three ſhillings.

(*p*) That money was coined here in the time of the *Saxons* is ſufficiently plain, but it is very doubtful whether the

It is true that *Gervaſius Tilburienſis*, who wrote the black book of the exchequer in the time of *Henry* II. commonly called *magiſter & diſcipulus*, *Lib.* I. *cap. à quibus & ad quid inſtituta fuit argenti purgatio*, ſays, that in the times of king *William* I. *William* II. and *Henry* I. the antient farms of the king's demeſnes were anſwered in cattle, corn, and other proviſions in ſpecie, becauſe it ſaved the king the trouble of purveyors, and money was ſcarce among the people, and yet the reſervations of their rents were in money, *viz.* ſo many pounds *numero*, or ſo many pounds *blanc*; *de quibus infra.*

And to make an equation between the proviſions, that were anſwered in kind, and the rents that were reſerved, there were certain rates or prices agreed upon almoſt all ſuch proviſions, as for wheat for one hundred men *per diem* twelve pence, for a fat ox twelve pence, *&c.* which it ſeems were deliverd to the ſheriff, and by him anſwerd to the king in money or kind, as it was agreed.

But thoſe farm rents, that were reſerved out of the cities, boroughs, franchiſes, *&c.* becauſe they had not proviſions in kind were anſwered in money according to their reſervations.

In the time of *Henry* I. this anſwering of farms by proviſions ceaſed, and the tenants paid their money according to the letter of their reſervations; the king was weary of receiving, and the farmers weary of paying their rents in victuals and proviſions, but money ſtill was in uſe as the common inſtrument of commerce and valuation.

In the troubleſome time of king *Stephen* we are told by *Roger Hoveden ſub anno* 1149. *Omnes potentes tam epiſcopi, quam comites & barones ſuam faciebant monetam*, which occaſioned a great confuſion and corruption in money and commerce (*q*): *Henry* II. coming to the crown reformed this uſurpation and abuſe, *novam fecit monetam, quæ ſola accepta erat & recepta in regno* (*r*); and thus it hath hitherto obtaind, only ſome particular

the *Britons* ever coined any; in *Cæſar*'s time they uſed only iron-rings, or pieces of braſs; *Cæſar. Com. de B. G. lib.* 5. *n.* 12.

(*q*) *William of Newbury* writes thus under the reign of king *Stephen*, *Erant in* Anglia *quodammodo tot reges vel potius tyranni, quot domini caſtellorum, habentes ſinguli percuſſuram proprii nummiſmatis.*

(*r*) See *Wilk. Leg. Henry* II. *p.* 320. where theſe words are alſo added, *abdicata jam*

ticular corporations eccleſiaſtical, as biſhops and abbots had ſpecial privileges granted to them to have mints (ſ), ſome one ſtamp, ſome two, ſome more, which yet were ſent to them from the king's exchequer, and their officers ſworn to the king to deal faithfully in their offices.

Yet after this king's time, eſpecially in the beginning of king *John*'s time, there was a great uncertainty and diſorder both in the weight and allay of coin; for *Clauſ. 7 Johann. m.* 24. *Sciatis quòd recepimus per manum* Petri *de* Ely, *&c. trecentas libras numero, quæ ponderabant quingentas libras* 47 *s.* 8 *d.* and in the ſame roll, *m.* 25. *recepimus de* Theſauro *per manus* Petri *de* Ely, 1725 *l. &* 11 *s.* 6 *d. numero, quæ ponderabant* 1556 *l.* 17 *s.* 6 *d.* which holds no proportion with the former.

Henry III. had a troubleſome reign, and malefactors abounded eſpecially in relation to the clipping of money; in his thirty-ſecond year he made new money, and ordained *ne quis denarius, niſi legitimi ponderis & circularis formæ uteretur*, clipt money not being to be received but perforated, and divers offenders were hanged. *Mat. Paris ſub anno* 1248. (t) but we have not the juſt ſtandard or weight of his money.

In the time of *Edward* I. we know what the weight and allay of his current money was, namely the allay was *Sterling*, twenty ſhillings made a pound weight troy, and twenty pence an ounce, ſo that the pound of *Sterling* ſilver made two hundred forty *Sterling* pence.

There were other baſe monies in his time, as namely, thoſe that were decried by the *Articuli de monetâ*, and *Pollards* and *Crocards*; what the value of the latter was I know not, but it appears by *Clauſ.* 28 *E.* 1. *m.* 6. *quòd pro quâlibet libra pollardorum una marca* Sterlingorum *ſolvitur ad Scaccarium*: they were both decried in the 28 *E.* 1. (u). *Vide Dy.* 81. This rate of *Sterling* continued during ſome time of *Edward* II.

I have

jam procerum illa; the truth is, this reformation of the money began to be made towards the latter end of *Stephen*'s reign, for among the articles of peace between *Stephen* and *Henry* this was one, that the ſilver coin ſhould be one and the ſame throughout the kingdom. *Ibid. p.* 315. *Mat. Paris, p.* 139.

(ſ) See a charter of king *John* allowing this privilege to *Hubert* archbiſhop of *Canterbury*. *Wilk. Leg. Johannis, p.* 355.

(t) *p.* 747.

(u) As appears by the proclamation, *Quod Pollardi & Crokardi non currant in regno* Angliæ. *Clauſ.* 28 *E.* 1. *m.* 12. *dorſ.* by which record it alſo appears, that

I have not ſeen any indentures of the mint between the time of *Edward* II. and the 46 *Edward* III. (*x*), and then by the indenture of the mint *Clauſ.* 46 *E.* 3. *m.* 18. a pound of gold made forty-five nobles, each noble ſix ſhillings and eight pence, and was to conſiſt of twenty-three carets, three grains and an half of fine gold, the reſt allay; the coinage to be four ſhillings for each pound for the maſter of the mint, and twelve pence for the king; the pound valued at fifteen pounds; and the merchant upon the return to have out of the *Tower* fourteen pounds fifteen ſhillings.

A pound of ſilver was to make three hundred pence, and ſo in that proportion groats, half-pence and farthings, which was to be of the allay *du viel Eſterling*, *viz.* eleven ounces two-penny weight of fine ſilver, and eighteen penny weight of allay, eight pence to be allowed for coinage.

The next Indenture I find is 3 *H.* 4. *p.* 2. *m.* 9. *dorſ.* whereby a farther alteration was made.

The pound of gold made the ſame quantity of nobles, and was of the ſame allay as before, only upon every pound was allowed three ſhillings and ſix pence to the maſter, and one ſhilling and ſix pence to the king for coinage.

The ſilver coin of the ſame fineneſs, weight and allay, as by the indenture of 46 *E.* 3. the coinage eight pence, whereof ſeven pence to the maſter, and one penny to the king upon every pound weight.

Clauſ. 1 *H.* 5. *m.* 35. *dorſ.* the allay of gold and ſilver ſtill the ſame as before, but ſome other variance there was.

The pound of gold was now to make fifty nobles, the value of the whole pound to be ſixteen pounds thirteen ſhillings and four pence, the coinage five ſhillings.

that two *Pollards* and one *Sterling* were much about the ſame value; for the words are *Licet nuper pro communi utilitate regni noſtri de conſilio noſtro ordinavimus, quòd duo Pollardi, vel duo Crokardi currerent in eodem regno pro uno* Sterlingo.

(*x*) But among the records in the *Tower* there are ſeveral indentures to be found within that time, *viz.*
Clauſ. 18 *E.* 3. *p.* 2. *m.* 19. *d.*
Pat. 18 *E.* 3. *p.* 1. *m.* 27.
Clauſ. 23 *E.* 3. *p.* 1. *m.* 21. *d.*
Clauſ. 25 *E.* 3. *m.* 15. *d.*
Clauſ. 29 *E.* 3. *m.* 6. *d.*
Clauſ. 35 *E.* 3. *m.* 10. *d.*

The pound of ſilver was to make three hundred and ſixty pence, the coinage was nine pence to the maſter, and three pence to the king; ſo that now the pound of ſilver made thirty ſhillings *Sterling*, which began in *Rot. Parl.* 13 *H.* 4. *n.* 28. by ordinance of parliament.

Clauſ. 9 *H.* 5. *m.* 2. *dorſ.* the ſame weight and allay of gold, *viz.* every pound of gold to make fifty nobles, the coinage to the king three ſhillings and ſix pence, to the maſter eighteen pence.

The like as to ſilver in all points as by the indenture of 1 *H.* 5. only the maſter to have nine pence, the king three pence for coinage.

Clauſ. 1 *H.* 6. *m.* 13 & 15. The indenture agrees in all things with that of 9 *H.* 5.

Clauſ. 4 *E.* 4. *m.* 20. The king by proclamation inhanſeth the value of coin, ſo that the noble of gold, which before was ſix ſhillings and eight pence, is now raiſed to eight ſhillings and four pence, three groats make a ſhilling, and ſo do twelve pence, and twenty ſhillings make a pound.

And afterwards he made new coins according to the ſtandard of gold aforeſaid, *viz.* the noble of gold eight ſhillings and four pence, and the pound of ſilver raiſed to thirty-ſeven ſhillings and ſix pence; and now I ſhall follow *John Stowe* in his *Survey of London*, *p.* 47.

H. 7. raiſed the rate of *Sterling* ſilver coin to forty pence the ounce.

18 *H.* 8. the pound of ſilver coin was raiſed to forty ſhillings.

35 *H.* 8. the coin of gold was raiſed to forty ſhillings the ounce, the coin of ſilver to four ſhillings the ounce, and coins of baſe money of allay below *Sterling* were coined, *viz.* ſhillings, ſix-pences, four-pences, two-pences, pennies: theſe were decried in 5 *E.* 6. and the ſhilling reduced to nine pence, and after to ſix-pence. (*y*)

30 *Octob.* 5 *E.* 6. Silver *Sterling* coin inhanſed to five ſhillings the ounce, and ſo proportionably; and coins of fine gold,

(*y*) *Dyer* 82.

gold, a whole ſovereign was thirty ſhillings, an angel ten ſhillings, and baſe money to paſs as before.

2 *Eliz.* The baſe money was called in and brought to the mint and reduced to *Sterling* and new coined, and the droſs given to repair the highways.

16 *Novemb.* 2 *Jac.* By proclamation the new coins of gold and ſilver then made, together with their impreſſions, inſcriptions, weight, and values were proclaimed; and 23 *Novemb.* 9 *Jac. per proclamation* the coins of gold are inhanſed, *viz.* thirty ſhillings to thirty-three ſhillings, twenty ſhillings to twenty-two ſhillings, fifteen ſhillings to ſixteen ſhillings, ten ſhillings to eleven ſhillings, five ſhillings to five ſhillings and ſix-pence.

Upon theſe variations theſe things are nevertheleſs obſervable, *Firſt*, That the old *Sterling* gold is this, that one pound of *Sterling* gold contains twenty-three carets three grains and a half of fine gold, the reſt to make it up twenty-four carets is of allay of copper. *Secondly*, That the old ſtandard of *Sterling* ſilver is, that every pound weight of *Sterling* ſilver conſiſt of eleven ounces two-penny weight of fine ſilver, and eighteen penny weight of allay of copper. *Thirdly*, That this rate of *Sterling* gold and ſilver hath moſt plainly continued to be the ſtandard of *Engliſh* gold and ſilver coin, at leaſt from the time of *Henry* III. until this day in *England* without any conſiderable alteration, ſaving that baſe money, which was ſtampt in the time of *Henry* VIII. and then reduced to a lower valuation by *Edward* VI. and after re-eſtabliſhed by *Edward* VI. to its former value. *Fourthly*, That, as well in *England* as *Ireland*, there hath been imbaſing of the ſpecies of money, as appears in theſe two inſtances in the time of *Henry* VIII. and *Edward* VI. which are yet the only inſtances that I find of that nature in *England*. *Fifthly*, That queen *Elizabeth* decried by proclamation all that baſe money, which was in uſe in the time of her father and brother, and ever ſince that proclamation, *viz.* 2 *Eliz.* the true old *Sterling* ſtandard both of gold and ſilver hath been the only ſtandard of the *Engliſh* current money. *Sixthly*, That altho the ſtandard of *Sterling* hath

hath with great conſtancy obtaind in *England*, yet the denomination or extrinſic or impoſed value hath varied according to the pleaſure of the king both as to gold and ſilver coin, as appears by what goes before; for in *Edward* I.'s time the ounce of *Sterling* ſilver was twenty pence, the pound twenty ſhillings or two hundred and forty pence; in *Edward* III.'s time the pound of *Sterling* was three hundred pence; in the time of *Henry* V. and ſo downward to *Edward* IV. three hundred and ſixty pence, or, which is all one, thirty ſhillings; in the time of *Edward* IV. the pound of ſilver was thirty-ſeven ſhillings and ſix-pence; in 35 *H.* 8. the pound of *Sterling* ſilver was forty ſhillings; in 5 *E.* 6. and ſo down to this day the ounce of ſilver five ſhillings or ſixty pence, and the pound of *Sterling* ſilver three pounds or ſeven hundred and twenty pence, which in *Edward* I.'s time was only two hundred and forty pence, which now is thrice as much as then it was. *Seventhly*, That I find rarely any proclamation for the ſetting of the rate of new coin, but only as before, when the denomination of what is in being is inhanſed, or abated, or recalled; ſo that the indenture of the mint and common reputation is that, which muſt try what is *Engliſh* money. *Eighthly*, That I never find either in the indentures of the mint or any proclamation the ſtamp, impreſſion, or inſcription deſcribed, unleſs in that of king *James*, becauſe the ſtamps are agreed upon between the king and the maſter of the mint, and delivered to him by the king, or his warrant either of the great ſeal, privy ſeal, ſignet, or ſecretary of ſtate.

CHAP. XVIII.

Concerning the adulteration or impairing of coin, *and the antient means uſed to remedy it.*

THE Decays or impairment of coin is either in weight or allay, the former may happen by ſome abuſe of the moniers or minters, or by the ſubtilty of clippers, waſhers and other impairers of coin; the latter, *viz.* impairment in allay, can only happen either by the diſhoneſty of the moniers or minters, or by the counterfeiting of coin.

Antiently all money was paid in number, namely ſo many pieces made a pound, and this was the common reſervation and account of all farms, and the eſtimating of accounts, *vicecomes* A. *reddit compotum de* 100 *l. numero*, or *in theſauro* 100 *l. numero.*

But this did not anſwer all intentions, for the money that was paid in might be clipt, or otherwiſe rendred light, or might be counterfeit, or of a baſe allay.

For remedy whereof there was practiſed theſe three methods of rectifications of payments at the exchequer, that the king might not be deceived, and theſe were ſucceſſively uſed in the exchequer, which we may read *Gervaſ. Tilb. Lib.* I. *ſupra quibus.*

1. *Solutio ad ſcalam*, which it ſeems was a diſh or meaſure, whereby they meaſured their money, as well as told it, for that is the proper ſignification of *ſcala:* but in proceſs of time this was turned into a meaſure of money, which was an addition of ſix pence for every pound, to avoid the trouble of that probation, whereby an hundred pounds *numero* amounted to an hundred pounds and fifty ſhillings *ad ſcalam*; and ſo we have frequently in the old pipe-rolls of *Henry* II. *Richard* I. king *John*, &c. *in theſauro* 100 *l. ad ſcalam.*

2. *Solutio ad penſum*, which was the anſwering of every pound of money by weight of a pound weight troy, for in thoſe times the *libra argenti* coin did or was to anſwer a pound weight troy, and therefore the payer was to make it good of that weight by anſwering the full weight; this gave the frequent title in the old pipe-rolls, alſo *in theſauro* 100 *l. ad penſum.*

But altho this *ſolutio ad ſcalam* or *ad penſum*, eſpecially both together, did give ſome help againſt the defect of coin in weight, as by clipping, waſhing, or the like, yet it did not help as to adulterate money of baſer allay than the ſtandard: Therefore,

3. There was found out in the time of *Henry* II. a third trial, namely trial by fire or combuſtion, and if it were of the juſt allay it was allowed, if below the allay the payer was to make it good, and hence he was ſaid *dealbare firmam*; and hence grew quickly a difference between reſervations and payments of ſo much money *numero*, and ſo much money *blanc.*

A reſervation of ſo much money generally was intended of ſo much *numero*, as if a pound were reſerved, it was in effect but twenty ſhillings *in pecuniis numeratis*; but if it were expreſly ſaid ſo much money *blanc*, then it was anſwerd in *blanc* money, but yet with this difference, that if a farm were letten and ſo much rent generally reſerved, it ſhould be intended ſo much *numero*, *in pecuniis numeratis*; but if a franchiſe or liberty were granted, and ſo much rent generally reſerved without ſaying *blanc* or *numero*, it was commonly intended *blanc*, unleſs expreſly ſaid *reddendo* ſo much money *numero*, and therefore in ſuch a caſe the former was bound *dealbare firmam*, that is to anſwer ſo much as would make his payment to be ſo much good in fine ſilver, or very near it at leaſt, *Gervaſ. Tilb. Lib.* II. *cap. quid ſit, quoſdam fundos dari blanc, quoſdam numero.*

And therefore upon all the antient accounts in the pipe made by the ſheriff we ſhall find ſome of his accounts of rents to run *numero*, ſome of them to run *blanc*, *viz. firma comitatûs numero*, & *firma comitatûs blanc*, according to the variety

riety of their reſervations or the things out of which they are reſerved; now what the proportion was between ſo much money *blanc* and ſo much money *numero* in thoſe antient times, or what this *blanc* money was, is worth the inquiring.

I have formerly thought that *blanc* money was nothing elſe but *Sterling*, and that *dealbare firmam* was no more, than to reduce money to the true allay of *Sterling*; but upon conſideration I think *blanc* money was truly ſo much fine ſilver without any allay, and that the true allay of *Sterling* ſilver or the antient ſtandard was twelve penny weight only of copper to every pound weight of ſilver; and therefore he, that upon his reſervation was to pay one hundred pounds of *blanc* money, was to anſwer to the king upon every pound of *Sterling* money one ſhilling to countervail the value of the allay of copper in every pound weight troy of ſilver.

And hence it is, that the farms of moſt corporations antiently let with liberties, if one hundred pounds *per annum* were reſerved, uſually anſwerd one hundred and five pounds, the five pounds being to anſwer the allay of one of copper in the whole quantity.

21 *H.* 3. *in compoto comitatûs* North'ton *ſumma totalis* 102 *l.* 3 *s.* 7 *d. de quo* 4 *l.* 9 *s.* 4 *d. blanc, quæ ſunt extenſæ ad* 4 *l.* 13 *s.* 9 *d. ſubtrahuntur ad perficiendum corpus comitatûs, & remanet* 97 *l.* 13 *s.* 10 *d.* (*a*) *de quibus reſpondet de proficuo in magno rotulo.*

Clauſ. 19 *H.* 3. *p.* 1. *m.* 2. Sciatis *quòd pardonavimus dilectæ & fideli noſtræ* A. *comitiſſæ* Pembroch *centum triginta & quinque libras* blanc, *quæ extenſæ ſunt ad* 141 *l.* 15 *s.*

13 *E.* 3. *in compoto* Bedford & Bucks, Nicholaus Baſſelew 18 *l.* 4 *s.* 4 *d. numero pro* 17 *l.* 7 *s.* blanc.

That of 19 *H.* 3. exactly anſwers twelve pence *per* pound, which amounts to ſix pounds fifteen ſhillings, and added to one hundred thirty-five pounds make juſt one hundred forty-one pounds fifteen ſhillings.

And the other eſtimate is very near the ſame account, bating the difficulty of ſmall fractions, four pounds nine ſhillings and

(*a*) This ſhould be 97 *l.* 9 *s.* 10 *d.*

and four pence, with the adding of twelve pence for every pound to make it *Sterling*, amounts to about four ſhillings and ſix-pence, which added to four pounds nine ſhillings and four pence make four pounds thirteen ſhillings and ten pence; ſo the allay of *Sterling* at that time ſeems to be twelve pence of copper to every pound of ſilver.

The ſum therefore is, 1. That *blanc ferme* or *blanc* money was the eſtimate of money in pure ſilver without allay, and accordingly it was to be anſwerd, *viz.* one hundred pounds *blanc* was to anſwer one hundred and five pounds *numero*. 2. That a *ferme* or ſum of money *numero* was ſo much *Sterling* money according to the ſtandard of thoſe times. 3. That the ſtandard of *Sterling* money in thoſe times was finer than it hath been ſince the time of *Edward* I. namely *Sterling* was then eleven ounces eight penny weight finer ſilver, and twelve penny weight of allay. 4. That when at the exchequer they burnt the money to make aſſay of it, in caſe twenty ſhillings *numero* were reſerved, it ſufficed if it held the allay of *Sterling*, *viz.* eleven ounces, eight penny weight of pure ſilver, and twelve penny weight of allay; but if it were reſerved *blanc*, then tho good *Sterling* was brought to the teſt, yet it went for leſs than *Sterling* by twelve penny weight in every pound, and therefore they were to add five pounds in the hundred to make it up *blanc*. 5. But when this probation grew troubleſome and *Sterling* money was well eſtabliſhed, then they, that were to pay one hundred pounds *blanc*, paid one hundred and five pounds *Sterling*, as the common eſtimate of *blanc* money: it ſeems that in king *John*'s time the ſtandard of *Sterling* money was far lower and worſe, than at any time before or after, eſpecially towards the latter end of his reign.

The borough of *Wich* was antiently from the conqueſt till 17 *Johann.* held at the yearly rent of eighty pounds *per annum blanc*, which was anſwerd by the ſheriff in the times of *Henry* II. and *Richard* I.

7 *Johann.* the king granted the borough of *Wich* to the town at the farm rent of one hundred pounds *Sterling*: in the

the pipe-roll of 24 *H.* 3. *homines de* Wico *reddunt compotum de* 100 *l. numero, pro* 80 *l. blanc*, which imports theſe ſums to be equal, and afterwards 43 *H.* 3. *homines de* Wico *reddunt compotum de* 80 *l. blanc, que ſunt extenſe ad* 84 *l.* and in 17 *E.* 3. this eighty-four pounds was raiſed to eighty-nine pounds five ſhillings *numero* upon the extent, which *ferme* of eighty-nine pounds five ſhillings they have ever ſince anſwerd; whereby it appears the ſtandard of *Sterling* was but low in king *John*'s time, for eighty pounds *blanc* was in his charter eſtimated at one hundred pounds *Sterling*: again it was high in 43 *H.* 3. *viz.* after the rate of twelve penny weight of allay in a pound of fine ſilver, for there eighty-four pounds *Sterling* is rated to be eighty pounds *blanc*; and in *Edward* III. the ſtandard was lower, than twelve penny weight of allay, *viz.* above twenty-four penny weight of allay and more in a pound weight of fine ſilver; but afterwards raiſed to eighteen penny weight of allay towards the latter end of his reign, which hath hitherto continued as the true ſtandard of *Sterling* ſilver.

Theſe curioſities, tho they be not much in uſe at this day, yet they are fit to be known for underſtanding the old rolls.

CHAP. XIX.

Concerning the counterfeiting of the king's coin *what it is, what* the penalty *thereof antiently, and what at this day.*

HAving taken this compaſs I now deſcend to the offenſe itſelf, wherein I ſhall conſider, 1. What is the coin or money of the king. 2. What a counterfeiting thereof. 3. What the puniſhment before this ſtatute. 4. What the puniſhment ſince this ſtatute.

1. What ſhall be ſaid the king's money.

The money of a forein kingdom is not the king's money within this act, and therefore at common law the counterfeiting thereof was only puniſhable as a cheat; and now by the ſtatute of 14 *Eliz. cap.* 3. it is made miſpriſion of treaſon to counterfeit any forein coin of gold or ſilver, tho not made current here by proclamation.

The money of a forein kingdom made current by proclamation, tho it be now as to all civil reſpects the proper money of this kingdom, yet as to the crime of treaſon it was not the king's money within this act.

And therefore a ſpecial ſtatute was made, *viz.* 1 *Mar. cap.* 6. that if any perſon falſly forge or counterfeit any ſuch kind of coin of gold or ſilver as is not the proper coin of this realm, and is or ſhall be current within this realm by the conſent of the queen, her heirs or ſucceſſors, then ſuch offenſe ſhall be judged high treaſon.

This conſent cannot be but under the great ſeal, *viz.* by proclamation and a writ under the great ſeal annexed thereunto; or ſome other ſufficient notification under the great ſeal; and it muſt be of money of gold or ſilver, which I take to be a denomination *ex majore parte*, if it be ſuch a forein coin as is for the moſt part of gold or ſilver.

But even the counterfeiting in copper or braſs gilt, or in tin or alchymy, if the exemplar itſelf be of gold or ſilver, is within this act of 1 *Mar. cap.* 6.

If the coin of *Ireland* doth not ſubſtantially differ in the ſignature or impreſſion from the coin of *England*, the counterfeiting of that money here in *England* ſeems to be a counterfeiting of the king's coin here in *England*; but if the ſtamp or impreſſion bear no ſuch reſemblance, as is eaſily diſcernible, then it is conſiderable, whether it be a counterfeiting of the king's coin here, for *Ireland* is a diſtinct kingdom from *England*, tho part of the dominions of the crown of *England*.

Yet it ſeems that it is treaſon within the act of 25 *E.* 3. 1. Becauſe the words of the ſtatute are *ſa monoye*, and not ſpecially the money of *England*, and money coined by the king's authority in *Ireland* is *ſa monoye*, tho it be not the current money of *England*. 2. Becauſe by the expreſs words of the ſtatute of 25 *Eliz.* the clipping of coin of this realm, *or any the dominions thereof*, is enacted to be treaſon; it is not to be ſuppoſed that the parliament would make the *clipping* of *Iriſh* coin treaſon, unleſs the *counterfeiting* thereof were treaſon; and with this the reſolution of the caſe of mixt monies in Sir *John Davys*'s reports agrees, *viz.* that the imbaſed coin ſtampt for *Ireland* is lawful money of *England* within the condition of a bond for payment of money in *Ireland*.

What ſhall we ſay concerning the farthings and half-pence of copper newly minted in *England* and proclaimed as before to be current money, is the counterfeiting thereof treaſon?

It is true in antient proclamations for farthing-tokens it was not uſual to be, that it ſhould be current money, but only that it ſhould be uſed as tokens, and the puniſhment of counterfeiters was either in the ſtar-chamber, or by information or indictment, and fine and impriſonment in the king's bench.

And yet it ſeems to me, that this proclamation makes it not the king's money within this act of 25 *E.* 3. 1. Becauſe it is ſo made only to a ſpecial purpoſe namely in receipts and payments under ſix-pence, and not otherwiſe. 2. Becauſe here is no diſpenſation or *non obſtante* of the ſtatute of 25 *E.* 3.

E. 3. Again, when by the ſtatute of 25 *E.* 3. *cap.* 13. it is enacted, that the money of gold or ſilver, which now runneth, ſhall not be impaired in weight or allay, we can hardly think it ever intended that the copper money ſhould be that money, which ſhould be intended within the act made at the ſame parliament touching treaſon; but *quere tamen.*

If money be decried and varies ſignally from the ſtamp and impreſſion in the coin that is commonly allowed, this is not money within this act, for it hath loſt its denomination and legitimation by the king's proclamation. (*a*)

The money of an uſurper bearing his ſtamp and effigies and inſcription, is the king's money in the time of the ſucceeding rightful king, till it be recald by proclamation. If upon the evidence againſt any counterfeiter of the king's coin, tho it be but of a late coinage or impreſſion, it comes in queſtion whether the coin, that is counterfeited, were the coin of this kingdom, it is not neceſſary to produce a proclamation to prove its legitimation for theſe reaſons; 1. Becauſe where there were proclamations of coin they are for the moſt part loſt, if we ſhould be put to prove a proclamation for the coins of queen *Mary*, queen *Elizabeth*, where ſhould we find them? 2. Becauſe in moſt kings times there are variations of the impreſſions without any proclamation, or ſo much as a new indenture between the king and the maſter of the mint. 3. Becauſe there are very few proclamations, except that before-mentiond in king *James*'s time, that expreſs any more than the weight and allay, but the impreſſion or effigies is rarely, if at all, expreſſed, and ſo ſuch proclamation would import little to aſcertain the effigies or ſtamps; and for the ſame reaſon the indenture of the mint is not abſolutely neceſſary, tho in ſome caſes it may be uſeful. 4. Becauſe eſpecially in antient coins *ex diuturnitate temporis omnia præſumuntur ritè acta*, if proclamation or indenture be neceſſary, it ſhall be preſumed in length of time, as a licence of appropriation ſhall be preſumed by long continuance, tho not ſhewn. The

(*a*) For this reaſon, when the broad pieces were cried down, and the officers of the revenue charged to take them in payment for one year after, it was thought neceſſary by a ſpecial act of parliament 6 *Geo.* II. *cap.* 26. to make the counterfeiting of them during that year treaſon.

The queſtion therefore, whether the coin that is counterfeited be the coin of this kingdom, is a queſtion of fact, which upon evidence of common uſage, reputation, *&c.* may be found to be *Engliſh* coin, tho no proclamation of it extant.

But it may be of ſome uſe in caſe of newneſs of coin to produce the indentures, or the officers of the mint, or the ſtamps here uſed for the coin, and the like evidences of fact.

But as to forein coin legitimated here it ſeems neceſſary to ſhew the proclamation together with the proclamation-writ, or a remembrance thereof; and this is expreſly required by the ſtatutes of 5 & 18 *Eliz.* for impairing or clipping forein coin.

II. I come to the *ſecond* conſideration, what is a counterfeiting within this law.

And before I come to particulars it muſt be remembred, that the misfeaſances concerning coin refer to two ſorts of perſons; *firſt* to ſuch as are authorized either by their office or by charter or by cuſtom to coin money, *monetarii*, moneyers, minters; or *ſecondly* thoſe, who do counterfeit or take upon them the ſtamping of coin without ſuch authority, counterfeiters, clippers, waſhers, *&c.*

Touching the former of theſe 3 *H.* 7. 10. (*b*). *Si ipſe, qui facit monetam in* Angliâ *authoritate regiâ infra turrim* London *vel alibi in* Anglia *vel* Calicia, *illam facit minus in pondere per dimidium ordinationis antiqui ponderis, &c. vel falſo metallo, eſt proditio, & tamen ipſi, qui illam monetam utterant ligeis domini regis infra* Angliam *non ſunt proditores nec proditio, ſed miſpriſio.*

But it is not every miſtake in weight or allay, that chargeth the moneyers with ſo high a crime as treaſon, for the maſter is chargeable by his indentures to a fine and ranſom for ſome miſtakes of this nature; but it muſt be a wilful groſs proditorious doing it, for the indictment runs *proditoriè*, and ſo it muſt be proved, for it is difficult for the beſt artiſt to make every piece of the preciſe weight.

(*b*) *pl.* 3.

Touching others that either counterfeit or imbase the coin.

First, There must be an actual counterfeiting, for a compassing, conspiracy or attempt to counterfeit is not treason within this statute without an actual counterfeiting.

But if many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within this statute, for in such case in treason all are principals.

How far a receiver is a principal, *videbimus infra Co. Pla. Cor.* 138. *Dyer* 296.

If *A.* counterfeits, and by agreement before that counterfeiting *B.* is to take off and vent the counterfeit money, *B.* is an aider and abetter to such counterfeiting, and consequently a principal traitor within this law; but if *B.* knowing that *A.* hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be all one with a receiver of him, because he maintains him.

If *A.* counterfeit money, and *B.* knowing the money to be counterfeit vent the same for his own benefit, *B.* is neither guilty of treason nor misprision of treason, but it is only a cheat and misdemeanor in him punishable by fine and imprisonment.

But if *B.* know that *A.* counterfeited it, and doth neither receive, maintain or abet him, but conceals his knowledge, this is misprision of treason; and with this difference the book of 3 *H.* 7. above-cited is to be understood, and so it was ruled upon debate at the sessions at *Newgate Car.* 2. *ex libro Bridgman.* (c)

A. fashions stamps for the counterfeiting of money, but he is discovered and apprehended before he hath actually counterfeited it; this is no treason within this statute (d), for tho he hath counterfeited the stamps, yet he hath not counterfeited the money of *England*.

A. coun-

(c) *Mich.* 16 *Car.* 2. in the case of *Richard Oliver*, *Kel.* 33.

(d) 1 *Rich.* 3. 1. but is treason by the statutes of 8 & 9 *W.* 3. *cap.* 25. and 7 *Ann. cap.* 25.

A. counterfeits the king's money, but never vents it; this is a counterfeiting, and treaſon within this ſtatute, and ſo it hath been ruled *Co. P. C. p.* 16.

A. counterfeits the coin of this kingdom or any forein coin of ſilver or gold of any forein kingdom (*e*), and this counterfeiting is in another metal, as tin, lead, alchymy, copper gilt or ſilvered over, yet the former is treaſon within the ſtatute of 25 *E.* 3. and the latter within the ſtatute of 1 *Mar.* If there be a lawful coin of this kingdom, and *A.* doth counterfeit it in a conſiderable meaſure, but yet with ſome ſmall variation in the inſcription, effigies, or arms, to the intent thereby to evade the ſtatute, yet this is a counterfeiting of the king's money, and that intent doth unqueſtionably appear, if he vent it as true: *vide ſupra de privato ſigillo.* 16 *Jac.* (*f*)

The clipping, waſhing or impairing, *&c.* of forein coin made current by proclamation moſt certainly was not treaſon by the ſtatute of 25 *E.* 3. but was made treaſon *de novo* by the ſtatute of 5 *&* 18 *Eliz.*

But whether the clipping, waſhing or impairing the proper coin of this realm for lucre or gain were treaſons within this ſtatute of 25 *E.* 3. or not, is a queſtion that deſerves conſideration, which, tho it be now ſettled by thoſe ſtatutes to be treaſon, yet it is of moment to be known; if it were and continues treaſon by the act of 25 *E.* 3. then the judgment is only to be drawn and hanged; if it be a new made treaſon, then by my lord *Coke's* opinion the judgment muſt be to be hanged, beheaded, and quartered, as in treaſon for compaſſing the king's death. *Co. P. C. p.* 17.

I will therefore give the hiſtory of this buſineſs of waſhing, clipping, *&c. ab origine* from the time of the ſtatute of 25 *E.* 3. for the hiſtory of former times at common law will be given in the next ſection.

It appears by the record of *M.* 31 *E.* 3. *coram rege rot.* 18, 55. *Bucks*, cited by *Co. P. C. p.* 17. within ſix years after the ſtatute of 25 *E.* 3. that for counterfeiting and refection of the king's

(*e*) This muſt be ſuppoſed to be forein coin current within the realm, for to counterfeit other coin is only miſprifion by 14 *Eliz. prout ſuper ſupra.*

(*f*) *Robinſon's* caſe, 2 *Rol. Rep.* 30.

king's coin *the abbot of Muſſenden* was adjudged to be drawn and hanged, but not quartered.

By the ſtatute of 3 *H.* 5. *cap.* 6. clipping, waſhing and filing of the money of the land is declared to be treaſon, and the offenders to be traytors, and ſhall incur the pain of treaſon; this was made to ſettle the doubt, and not purely as a new law.

The petition, upon which this act was made, is more full than the act, as it is printed, *Rot. Parl.* 3 *H.* 5. *part* 2. *n.* 40. "Item pryont les commons, qe come devant ces heures grand "doubt & awereſtee ad eſte, le quelle le tonſure, loture, "filinge, & autre fauxiſme de voſtre monoy duiſſent eſtre "adjugge treaſon ou nient, a cauſe qe null mention ent eſt "fait en la declaration des articles de treaſon faits en le par"lement de voſtre treſnoble beſaiel lan de ſon raigne 25. "Pleſe a voſtre royal majeſtee de ordeiner, declarer, & deter"miner en ceſt preſent parlement par authority dicel, qe "ceux, qe tondent, loient, filent, ou aſcun autre fauxiſme "facent de voſtre mony, ſoient adjugges traytors, & encur"gent la pain de treaſon, ſi bien come ceux qe apportent "faux money en *Engleterre* ſachant la eſtre faux, & qe ceſt "declaration ſi bien ſoy extende al tiels tonſure, loture, & "fauxiſme faits avant ces heures come a faire en temps avener. "Ro. Quant a le loture, tonſure & fileinge ſoit il declare "pur treaſon.

Nota, A retroſpect deſired, which was not uſual, unleſs the law had held it treaſon before.

By the ſtatute of 4 *H.* 7. *cap.* 18. counterfeiting or forging of forein coin current here is enacted to be treaſon, which before was neither felony nor treaſon.

By the ſtatute of 1 *E.* 6. *cap.* 12. it is enacted, that there be no other treaſon nor petty treaſon, but what was ordained by the ſtatute of 25 *E.* 3. or by that act; and after certain new treaſons enacted there is a *proviſo*, that this act extend not to repeal any act of parliament concerning the counterfeiting, forging, clipping, waſhing or filing any coin of this realm, or any coin of other realms made current here, or the bringing into the realm any counterfeit coin.

This proviſo was abſolutely neceſſary in relation to the treaſon in counterfeiting forein coin contrary to the ſtatute of 4 *H.* 7. *cap.* 18. becauſe a new treaſon, but whether neceſſary in relation to clipping or impairing the coin of *England* declared to be treaſon by the ſtatute of 3 *H.* 5. may be doubtful upon what herein after follows, but certainly was very fit and convenient to avoid the queſtion.

By the ſtatute of 1 *Mar. cap.* 1. it is enacted, that no offenſe being by act of parliament or ſtatute made treaſon, petit treaſon, or miſpriſion of treaſon, by words, writing, cyphering, deeds, or otherwiſe howſoever, ſhall be adjudged to be high treaſon, petit treaſon or miſpriſion of treaſon, but only ſuch as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon in or by the act of parliament of the twenty-fifth year of king *Edward* III. concerning treaſon, nor any pains, penalty or forfeiture to enſue upon any offender in treaſon, petit treaſon, or miſpriſion of treaſon, than ſuch as are ordained by that ſtatute; and all offenſes made felony or *præmunire* ſince 1 *H.* 8. not being felony or within the ſtatutes of *præmunire* before, and all articles, *&c.* concerning the ſame are repeald.

And yet it appears by the ſtatute of 1 *&* 2 *Ph. & M. cap.* 11. that then notwithſtanding the ſtatute of 1 *Mar. cap.* 1. they did take the impairing as well as forging or counterfeiting the king's coin to remain treaſon, for by that ſtatute of 1 *&* 2 *P. & M. cap.* 11. that makes the importation of forein counterfeit coin to be high treaſon it is provided, that any that ſhall be accuſed of the offenſes contained in the ſame ſtatute, or any other offenſe concerning the impairing, counterfeiting or forging of any coin current within this kingdom, ſhall be indicted, arraigned, tried, convicted and attaint by ſuch like evidence, and in ſuch manner and form as hath been uſed in *England* at any time before the firſt year of the reign of king *Edward* VI.

So that it ſeems they took impairing of any coin current to be a treaſon in force, but on the other ſide it may be ſaid, ſo they took alſo the forging of any forein coin current to be treaſon, when as yet the ſtatute of 4 *H.* 7. concerning

forging of forein coin made current ſtood repeald by 1 E. 6. but it is plain that no ſuch conſequence could be made, for by the ſtatute of 1 *Mar. ſeſſ.* 2. *cap.* 6. forging of forein coin made current here is enacted to be treaſon; ſo that as to the point of forein coin made current here, tho the ſtatute of 4 *H.* 7. *cap.* 18. ſtood repeald, yet 1 *Mar. cap.* 6. ſtood in force at the time of the making of the ſtatute of 1 *& 2. P. & M. cap.* 11.

Then enſues the ſtatute of 5 *Eliz. cap.* 11. which reciting in expreſs words, that the ſtatute of 3 *H.* 5. concerning clipping, *&c.* is repeald by 1 *Mar. cap.* 1. and the miſchief that happens thereby enacts, " That if after the firſt day of *May* " next clipping, waſhing, rounding, or filing for wicked lucre " or gain's ſake any of the proper monies or coins of this " realm or the dominions thereof, or the monies or coins of " any other realm allowd and ſufferd to be current within " this realm or the dominions thereof, or that hereafter at " any time ſhall be lawful monies or coins of this realm or " of the dominions thereof, or of any other realm, and by " proclamation allowd and ſufferd to be current here by the " queen, her heirs or ſucceſſors, ſhall be taken, deemed and " adjudged by virtue of this act to be treaſon, and the of- " fenders, their counſellors, conſenters and aiders ſhall from " and after the firſt day of *May* be deemed traytors, and ſuf- " fer pain of death and forfeit their goods, and forfeit all " their lands during their lives only.

" That all, that by charter have lands or goods of tray- " tors within their liberties, ſhall have theſe: a *proviſo* that " this act make no corruption of blood or loſs of dower.

And the act of 18 *Eliz. cap.* 1. declaring that the falſifying, impairing, diminiſhing, ſcaling or lightning of money was not within the act of 5 *Eliz.* which ought to be taken ſtrictly according to the words thereof, and the like offenſes not by any equity to receive the like puniſhments or pains, enacts thoſe offenſes to be treaſon almoſt *in totidem verbis* with that of 5 *Eliz.* with the like *proviſo*; and note this clauſe in both ſtatutes, *and the offenders being lawfully thereof convict or attainted according to the due order and courſe of the laws of this realm ſhall ſuffer the pains of death.* Theſe

3

Theſe acts do in effect declare, that this was not treaſon within the ſtatute of 25 *E.* 3. and that the ſtatute of 1 *Mar. cap.* 1. repeald that declaration that was made in 3 *H.* 5. and gives the reaſon, becauſe the law being penal ought to be taken and expounded ſtrictly according to the words, and the like offenſes not by any equity to receive the like puniſhment, and therefore lightning or ſcaling were not within the act of 5 *Eliz.* and neither within the act of 25 *E.* 3. againſt counterfeiting the coin.

And yet it is obſervable, that thoſe very judges, which were preſent at the making of the ſtatute of 5 *Eliz.* yet upon a ſolemn conſideration in *Wright*'s caſe, *T.* 6 *Eliz. Dyer* 230. did agree, that the judgment in treaſon *pro tonſurâ monetæ Angliæ* is no other but to be drawn and hanged, and accordingly judgment was given in that caſe; and upon ſearch of the precedents at *Newgate* I find, that altho ſome judgments in caſe of clipping of money are *to be drawn, hanged, beheaded and quartered*; yet the greater number both of former and latter times have been only *to be drawn and hanged* (*g*) according to the judgment in 6 *Eliz.*

And therefore my lord *Coke*, *Pl. Cor. p.* 17. tho he agree, that the judgment for counterfeiting the coin of *England* is only to be hanged and drawn, as it was before the ſtatute of 25 *E.* 3. ſeems nevertheleſs to be miſtaken, when in the ſame page he ſaith, that if any be attainted for diminiſhing the king's money upon the ſtatutes made in the time of queen *Mary* or queen *Elizabeth*, becauſe it is high treaſon newly made, the offender ſhall have judgment as in caſe of high treaſon, *viz.* to be drawn, hanged, beheaded, diſmembred, quartered, *&c.* for the greater number and better precedents run only to be drawn and hanged; and ſo it was lately ruled upon great conſideration in a caſe in the king's bench (*b*), tho perchance it is not error, whether the one judgment or other be given.

Upon the whole matter therefore it ſeems to me, 1. That altho it ſhould be admitted, that clipping of the coin of *England*

(*g*) *Morgan*'s caſe, *Cro. Car.* 383.

(*b*) The caſe of *Bellew* and *Norman*, 1 *Ven.* 254. 2 *Lev.* 98. *Reym.* 234.

land continued treaſon notwithſtanding the ſtatute of 1 *Mar.* that yet it is at this day treaſon merely by the ſtatute of 5 *Eliz.* and therefore every indictment at this day for clipping or impairing, *&c.* muſt purſue the words of the ſtatutes of 5 & 18 *Eliz.* and conclude *contra formam ſtatuti*; and this not only in the caſe of clipping of forein coin, which certainly was no treaſon after 1 *Mar.* and before 5 *Eliz.* but alſo in relation to the coin of *England*; and the reaſon is, 1. Becauſe this ſtatute hath added a qualification to theſe treaſons of clipping or lightning, *viz.* it muſt be *for lucre's ſake*, which muſt be expreſly laid in the indictment, but need not have been ſo laid by the ſtatute of 3 *H.* 5. for tho perchance it was intended, yet it was not expreſſed in that ſtatute, neither needed it then to have been in the indictment. 2. Becauſe in expreſs words the ſtatutes of 5 & 18 *Eliz.* ſay, that it ſhall be treaſon by virtue of this ſtatute, which is not a bare recital as in the beginning of the ſtatute, that the ſtatute of 3 *H.* 5. was repeald; but it is alſo an expreſs enacting clauſe, which is in effect excluſive of any other law to make it treaſon, but this of 5 or 18 *Eliz.* for theſe words are in both the ſtatutes. 3. Becauſe it extremely alters the conſequences of a judgment in treaſon, for here is no loſs of dower, no loſs of land but during life, no corruption of blood, ſo that theſe ſtatutes did perfectly intend a total new eſtabliſhment and qualification of this treaſon.

2. That altho this be a new law, yet in as much as neither at common law nor after the ſtatute of 25 *E.* 3. the treaſons or offenſes concerning money had any greater judgment, than ſuch as is given in caſe of petit treaſon, namely for the man to be drawn and hanged, the woman to be burnt, no higher or other judgment is to be given upon the ſtatutes of the 5th or 18th *Eliz.* and hence it is, that in the ſtatute of 25 *E.* 3. tho it rank counterfeiting money among high treaſons, yet it alters not the judgment that was at common law, nay tho it be moſt certain, that the ſtatute of 25 *E.* 3. as to ſome points of bringing in forein money be introductive of a new law, yet in as much as it concerns money, wherein the higheſt judgment at the time of 25 *E.* 3. was only that of

petit treaſon, it doth not inhanſe the judgment higher; and accordingly it was reſolved upon great advice and conſideration of precedents *Car.* 2. *Banco Regis* in the caſe (*i*) for clipping *Engliſh* coin.

3. That upon any trial of counterfeiting, clipping, waſhing, *&c.* the coin of *England* or forein coin made current, there is no neceſſity either upon the trial or the indictment of two witneſſes, required in other caſes by the ſtatutes of 1 *E.* 6. *cap.* 12. and 5 *E.* 6. *cap.* 11.

For as to the counterfeiting of money, or ſo much as was treaſon for impairing money, by 1 *&* 2 *P. & M. cap.* 11. it is expreſly provided, that no other evidence ſhall be requiſite either upon the indictment or trial than was before the ſtatute of 1 *E.* 6. and as to clipping and waſhing the very ſtatutes of 5 and 18 *Eliz.* in expreſs terms require only a conviction and attainder *according to the order and courſe of the law*; and therefore tho the ſtatute of 5 *E.* 6. *cap.* 11. enact, that two witneſſes or lawful accuſers ſhall be required upon proceeding for any treaſon, that now be or hereafter ſhall be, yet that act is thus far derogated by thoſe two acts, that require only an indictment, a conviction and attainder according to the order and courſe of the law generally; for tho it be held, that the ſtatute of 1 *&* 2 *P. & M. cap.* 10. that enacts, that all trials of treaſon ſhall be according to the courſe of the common law, doth not take away the neceſſity of two witneſſes upon the indictment, becauſe that is a diſtinct thing from the trial. 14 *Eliz.* lord *Lumley*'s caſe, *Dy.* 99. *Co. P. C. p.* 25. yet the words (*conviction and attainder after the order and courſe of the law*) mentiond in the ſtatutes of 5 and 18 *Eliz.* include the indictment as well as the trial, and therefore even without the aid of the ſtatute of 1 *&* 2 *P. & M. cap.* 11. reſtores the whole proceeding according to the order of the common law in caſe of clipping or waſhing, as the ſtatute of 1 *&* 2 *Ph. & Mar.* doth in expreſs words in caſe of counterfeiting.

And note, upon the ſtatutes of 5 and 18 *Eliz.* tho *Iriſh* coin be not current in *England*, when of a baſer allay, yet it is

(*i*) This I take to be the forecited caſe of *Bellew* and *Norman*, 1 *Ven.* 254.

the king's coin, and clipping or waſhing in *England* the coin of *Ireland* is treaſon by thoſe acts, for the words are *the coin of this realm or dominions thereof*, which extends to *Ireland*.

4. The *fourth* thing obſervable upon theſe ſtatutes is, that the act of 1 *Mar. cap.* 1. reducing all treaſons to the ſtandard of 25 *E.* 3. doth not only repeal treaſons, that were newly enacted *de novo*, but ſuch acts concerning treaſon as were only declarative, as this of 3 *H.* 5. among others.

IV. The *fourth* thing, that I propounded to conſider, is the hiſtory of the puniſhment of counterfeiters, *&c.* of coin before the ſtatute of 25 *E.* 3. and how it hath ſtood ſince.

In this kingdom and indeed in all kingdoms the counterfeiting of the king's money hath been in all ages *crimen læſæ majeſtatis* (*k*), tho in many of the old books (*l*) it comes under the general title of *crimen falſi*.

But the puniſhment in its kind and degree hath among *us* very much varied both in relation to the *monetarii* or moneyers, that were intruſted with the making of coin, and others, that took upon them to counterfeit the king's coin: among the laws of king *Athelſtan*, *l.* 19. ſet down by *Brompton*, *p.* 843. *Una moneta ſit in toto regni imperio, & nullus monetet extra portum, ſi monetarius reus fuerit, amputetur ei manus, & ponatur ſupra monetæ fabricam*, accord Hoveden *ſub anno* 1127. & M. Paris *ſub anno* 1125. (*m*)

In the time of *Henry* I. it is written by *Simon Dunelmenſis*, *p.* 214. *Monetarii totius* Angliæ *principales deprehenſi adulterinos, ſcilicet non puros ex argento, feciſſe denarios, juſſu regis ſimul* Wintoniæ *congregati omnes una die amputatis dextris evirantur*;

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(*k*) By the old *Roman* law, *Qui nummos aureos, argenteos adulteraverit, laverit, conflaverit, raſtrit, corruperit, vitiaverit, cultrove principum ſignatam monetam, præter adulterinam, reprobaverit, honeſtior in inſulam deportandus, humilior aut in metallum damnandus, aut in crucem tollendus*; and whatever degree he was of, *ejus bona fiſco vindicantur*: ſee *Jul. Pauli ſententias receptas*, *Lib.* V. *tit.* 12. §. 12. and *Lib.* V. *tit.* 25. §. 1. Afterwards by a law of *Conſtantius*, *Cudendæ pecuniæ obnoxii majeſtatis crimen commiſiſſe*, & *quicunque ſolidorum adulter poterit reperiri, ſammarum exuſtionibus mancipetur*, *Lib.* IX. *Cod. tit.* 24. *l.* 2. See alſo *Wilkin's Leges Anglo-Sax. p.* 59. *in notis*.

(*l*) *Bracton*, *Lib.* III. *de corona*, *cap.* 3. §. 2. *Glanvil. Lib.* XIV. *cap.* 1. *Flet. Lib.* I. *cap.* 22.

(*m*) *Leges Athelſtani*, *l.* 14. *Wilk. Leg. Anglo-Sax. p.* 59. See alſo *Leges Edgari*, *l.* 8. *Conſtitutiones Ethelredi in fine. Leges Cnuti*, *l.* 8.

tur; Et *ibidem p.* 231. *Qui falſos denarios fecerit, oculos & inferiores partes corporis perdet*; and *Knighton*, *p.* 2377. *H.* 1. *ſtatuit, ut fures ſuſpenderentur, falſarii oculos & genitalia amitterent, & ut denarii & oboli eſſent rotundi.* (*n*)

Knighton, *p.* 2463. "*Edwardus* primus tenuit parliamentum "apud *London*, fecit mutari monetam regni, quæ illo tem- "pore fuit viliter retonſa & abbreviata, unde populus regni "graviter conquerebatur, & rex veritatem inquirens, & "comperiens trecentos & plures de illo delicto & feloniâ "publicè convictos, quorum quidam fuerunt ſuſpenſi, qui- "dam diſtracti & ſuſpenſi ſecundum delicti quantitatem & "qualitatem, & ordinavit, quòd deinde *Sterlingus* & quadrans "deinceps eſſent rotundi:" ſo that clipping was then held treaſon or at leaſt felony.

After the ſtatute of 25 *E.* 3. the puniſhment hath been conſtantly to be drawn and hanged, becauſe that was the proper judgment of it before the making of the ſtatute.

And altho the courſe hath been in treaſons concerning the king's perſon not to allow the privilege of clergy, yet before 25 *E.* 3. *cap.* 4. *pro clero* it had been thought and practiſed in antient time to allow the privilege of clergy upon an indictment for counterfeiting money. (*o*)

But after that ſtatute clergy was not allowable in caſe of counterfeiting money, 19 *H.* 6. 47. *b. Stamf. Pla. Cor.* 114. *b.* yet whereas in caſes of treaſon regularly he that ſtands mute ſhall be thereby convicted, 15 *E.* 4. 33. *a. Stamf. Pla. Cor.* 150. *a.* becauſe not within the ſtatute of *Weſtmin.* 1. *cap.* 12. (*p*), yet we have ſome hiſtorical inſtances, that upon indictment of counterfeiting coin the priſoner ſtanding mute was put to *pain fort & dure*. *Knighton tempore R.* 2. *ſub anno* 1389. before *Belknap*,

(*n*) *Wilk. Leg. Ang.* 1. *p.* 304. *ſub anno* 1108. *p.* 308. *ſub anno* 1125.

(*o*) For clergy was antiently denied only in ſuch treaſons, as were immediately againſt the king's perſon, and therefore *Co. P. C. p.* 16. clergy was allowed in the caſe of counterfeiting the great ſeal. See alſo the caſe of *Burdon*, (*P.* 18 *E.* 2. *B. R. Rot.* 25. *Rex. South'ton*) who was admitted to his clergy on being convicted of felony and ſedition in counterfeiting the great ſeal; but in *Thorpe's* caſe, (*T.* 21 *E.* 3. *Rot.* 23. *Rex.*) who was convicted of ſedition in levying war, it was adjudged, that he could not be admitted to his clergy: *note la diverſite*; but the 26 *H.* 8. *cap.* 13. takes away clergy in all caſes of treaſon: *vide antea in notis p.* 185 & 186.

(*p*) 2 *Co. Inſt.* 177.

Belknap, Skipwith and others *apud* Lincoln *ſeptem falſarii monetæ convicti, qui ſimul tracti fuerunt & ſuſpenſi, & quidam vicarius de* Wintringham *obmuteſcens adjudicatus eſt ad pœnam mutorum*; but at this day the law is taken otherwiſe, and that ſtanding mute amounts to a conviction of the crime.

And in ſhort at this day in all caſes of treaſon for counterfeiting the coin of this kingdom, or of any the dominions thereof, or of forein coin made current by proclamation, or for waſhing, clipping, ſcaling, impairing, or diminiſhing the ſame, tho moſt of theſe are made treaſon by new acts of parliament, as 1 *Mar. cap.* 6. 5 *Eliz. cap.* 11. 18 *Eliz. cap.* 1. yet the judgment is only for a man to be drawn and hanged, for a woman to be burned, and ſo, (as I ſaid) it was ſolemnly reſolved.

And the reaſon is, becauſe tho moſt of theſe be new treaſons made by act of parliament, yet they are all in their matter concerning money, wherein the judgment at common law was, as in caſe of petit treaſon; and that judgment was not altered by 25 E. 3. in caſe of counterfeiting, which is the higheſt offenſe concerning money, and therefore is not to be exceeded by the intent of thoſe ſtatutes, which brought leſſer offenſes concerning money, as clipping, into the ſame rank of offenſe with counterfeiting, for they are all offenſes *in pari materiâ*, and ſo ſhall have a parity of judgment.

CHAP. XX.

Concerning treaſon in bringing in falſe money.

THE next point of treaſon is, if any man bring in falſe money into this realm counterfeit to the money of *England*, as the money called *Luſbborough* or other like to the ſaid money of *England*, knowing the money to be falſe, to merchandize or make payment in deceit of our lord the king and of his people.

Touching this point of treaſon theſe things are obſervable.

I. That the money in this caſe muſt be imported from a forein nation, for here it is not the counterfeiting, that is the treaſon, but the importing; and yet it ſeems by the general words of the ſtatute of 35 *H.* 8. *cap.* 2. the counterfeiting itſelf, tho out of the kingdom, may be tried in the king's bench, or before ſpecial commiſſioners, as well as any other treaſon.

But at common law the counterfeiting beyond the ſea ſeems not to have been ſuch a treaſon as could be tried here, as treaſon in adhering to the king's enemies might have been, and therefore the importing was made treaſon by this act.

Altho *Ireland* be within the ſtatute of 35 *H.* 8. *cap.* 2. for trial of treaſon in compaſſing the king's death or levying of war, as is before obſerved, and therefore as to that purpoſe out of the realm of *England*, yet it hath been held upon the obſcure book of 3 *H.* 7. 10. that an importation of counterfeit coin from thence into *England* is not treaſon here within that ſtatute, principally becauſe the counterfeiting itſelf is puniſhable by the ſtatute of 25 *E.* 3. which is of force in *Ire-*

land. Co. P. C. p. 18. And the like reaſon holds for the *Iſle of Man*; before this ſtatute there was ſome difficulty what this crime ſhould be.

In the time of king *Edward* I. there were three great inconveniences touching coin imported from forein parts, ſometimes they imported true coin of *England*, but ſuch as was clipped, ſometimes they imported counterfeit coin like to the coin of *England*, but of a baſe allay; and moſt times they imported forein coin, which yet paſſed between merchants, and filled the kingdom with bad money to the detriment of trade and the king's coinage.

And to remedy theſe inconveniences were thoſe three ordinances made, called *Statutum de moneta magnum, de monetâ parvum, & Articuli de monetâ*, by which ſearches were ordained of all coin imported, that if any clipt money or any forein money, other than of *England*, *Ireland* or *Scotland*, were taken, it ſhould be pierced and redeliverd to the owner, if it were falſe it ſhould be detained, and the bodies of ſuch as had falſe or clipt money to be attached (*a*), and if ſuſpicious, detained till he produce his warrant; that money be received by weight: and by the ſecond, *viz. Statutum de moneta parvum*, that if any merchant brought in clipt or counterfeit money, for the firſt offenſe he ſhould loſe the money, for the ſecond he ſhould loſe his money and goods, and for the third *de corporibus ſuis & de omnibus bonis & catallis ſuis nobis totaliter incurratur*; that if they were not merchants, they ſhould pierce the clipt and counterfeit money and ſend it to the exchange, otherwiſe in whoſe hands ſoever ſuch money ſhould be found, it ſhould be forfeited to the king; and by *Articuli de monetâ* the ſeveral faulty coins, forein and others, that had obtained in the kingdom by common uſe are deſcribed and decried.

By the ſtatute of 9 E. 3. *cap.* 2. *Item*, "That no falſe mo-
"ney or counterfeit *Sterling* be brought into this realm or elſe-
"where within our power upon forfeiture of ſuch money."

By

(*a*) See an ordinance to this purpoſe in the reign of king *John*. *Wilk. Leg. Anglo-Sax. p.* 359.

By an act or rather an advice, *Rot. Parl.* 17 E. 3. *n.* 15. *qe nul ſoit ſi hardy de porter fauſſe & malveis monoie en roialme ſur peyn de forfeiture de vie & membre.*

Rot. Parl. 20 E. 3. *n.* 15. A complaint of importation of falſe money, eſpecially the falſe money called *Luſſheburnes*, praying *de punir ceux, qe ſont trovez culpablez de l'apport, ou de le reſceit de eux ſachant le fauxiſme, par judgmens come faux monyers.*

Ro'. Quant a ceſt point de ceux, qe apportent la faux mony deins le realme, & qe le uſent per voy de merchander ent ſachaiant, le roy voet, quils eient judgment de vie & de membre, come faux monyers, ſolonc les leys & cuſtomes de realme; but this was never drawn up into an act: yet *Rot. Parl.* 21 E. 3. *n.* 19. the commons deſire the penalty may ſtand according as was ordained in the laſt parliament, and that it extend as well to the time paſt as to come, *& qe nul chartres de pardon ſoient grant de dit fauxime & treaſon*: they were anſwered, that the juſtices ſhould be aſſigned to enquire of the time paſt and to come after this act, and to do right, and that pardons be not granted *cy legerment.*

By which it appears, that it was never ſettled to be treaſon till 20 E. 3. and even from that time there was but a faint proceeding upon that offenſe.

But this ſtatute of 25 E. 3. was that, which made the final ſettlement in this point.

But this makes only the apporters themſelves, their aiders, abettors, and aſſiſtants, traytors, not thoſe, that receive it at the ſecond hand; and this ſtands with reaſon and is conſonant to the ſtatute of *moneta* before cited, which rendred the merchants offenſe puniſhable at the third time with death, but ſubjected others only to loſs of the money, if not pierced and carried to the exchange.

II. That it be counterfeit after the ſimilitude of the money of *England*, otherwiſe it is not treaſon: the bringing in of money counterfeit after the ſimilitude of forein coin made current here by proclamation is not treaſon within this act; but by the ſtatute of 1 & 2 *Ph. & Mar. cap.* 11. it is enacted, "That if any perſon after *Jan.* 20. next ſhall bring from

" the

" the parts beyond the ſea into this realm or into any of the " dominions of the ſame any falſe and counterfeit coin of " money being current within this realm as aforeſaid, (*viz.* " by the ſufferance and conſent of the king and queen,) " (*which extends to the ſucceſſors*) knowing the ſame coin or " money to be falſe and counterfeit, to the intent to utter " or make payment of the ſame within this realm or any " the dominions of the ſame, by merchandizing or other- " wiſe, that every ſuch offender, their counſellors, procu- " rers, aiders and abettors ſhall be deemed traitors, and for- " feit as in caſe of high treaſon.

And by the ſtatute of 14 *Eliz. cap.* 3. forging of forein coin not current by proclamation, as well without the realm as within, is made miſpriſion of treaſon; but that act extends only to the counterfeiting, whether within the realm or without, but not to the bare importing; the inſtance that is here given is of *Luſhboroughs*, which were a baſe counterfeit coin after the ſimilitude of *Engliſh* coin.

Other monies both before and after this ſtatute there were, ſome counterfeit, ſome clipt, ſome of baſer metal, ſome forein, which had their ſeveral courſes and periods in this realm: *Pollards* and *Crokards*, that obtaind ſome time in *Edward* I. but were after decried by proclamation 24 *E.* 1. *vide Dy.* 81. Other ſeveral baſe coins in the ſame king's time mentiond in the ordinance of *Articuli de monetâ*, *black money*, which had been formerly current here, recald by the ſtatute of 9 *E.* 3. *de monetâ*, *cap.* 4. *Suskins*, *Dodkins*, and *Gally* half-pence recald by the ſtatute of 11 *H.* 4. *cap.* 5. 3 *H.* 5. *cap.* 1. *Scotch* money recald by the ſtatute of 3 *H.* 5. *cap.* 1. *Blankes* recald by the ſtatute of 2 *H.* 6. *cap.* 9. and ſeveral penalties, ſome general, ſome of felony applied to them; but theſe were for the moſt part out of this ſtatute, and obtaind here by connivence, till recald.

III. The next qualification of this offenſe is, that the bringer in muſt know it.

IV. The next qualification is, that he muſt bring it to merchandize or make payment thereof in deceit of the king and his people.

Counterfeiting of the king's coin without uttering of it is treaſon; clipping, waſhing, *&c.* by the ſtatutes of 5 and 18 *Eliz.* is treaſon, but it muſt be for gain or profit, and here the importing is not treaſon, unleſs it be to merchandize or utter it.

And hereupon my lord *Coke* (*b*) concludes, that he muſt merchandize therewith, or make payment thereof; it is a favourable expoſition, but the ſtatute is not, that if he import and merchandize, but *pur merchandizer & payment faire*, if it were to that intent, the ſtatute makes it treaſon.

And by the ſtatute of 1 *&* 2 *Ph. & Mar. cap.* 11. touching importation of coin counterfeit of forein money, it muſt be to the intent to utter and make payment of the ſame; and tho the beſt trial of an intention is by the act intended when it is done, yet the intent in this caſe may be tried and found by circumſtances of fact, by words, letters, and a thouſand evidences beſides the bare doing of the fact.

As in caſe of thoſe many acts, that prohibit lading of wool, gold, ſilver, *&c.* with an intent to tranſport the ſame, whereby ſome are made felony, *&c.* the intent ſhall be tried in thoſe caſes (being joined with an act) by circumſtances, that evidence the intent of that action, for tho bare intentions cannot receive any trial, yet intentions joined with an overt-act, as here importation, may be tried and diſcoverd by circumſtances.

So that it ſeems the very importing of counterfeit money *pur merchandizer*, *&c.* to the intent to merchandize or make payment therewith, tho no ſuch merchandize or payment be actually made, is treaſon by this ſtatute, if the party importing know it to be ſuch, and that as well his intent as his knowledge lies in averment and proof.

And thus far concerning treaſons relating to money.

(*a*) *Co. P. C. p.* 18.

CHAP. XXI.

Concerning high treason in killing the chancellor, *&c.*

I Come shortly to treat of the last kind of high treason declared by this act.

Si home tuast chancellor, treasurer, ou justice nostre seigneur le roy del un banck ou del autre, justice in eyre, ou de assises, & touts autre justices assignes de oyer & terminer, esteant en lour place sesant lour office.

I. This statute extends only to the actual killing of some of these officers, and therefore a conspiring to kill any of these without actual killing of any of them is not treason; but if many conspire to do the act, and one of the conspirators actually do it, this seems to be treason in them all, that are abettors or counsellors to do the act, as is before instanced in levying of war, and therefore there is a particular act made 3 *H.* 7. *cap.* 14. that makes the conspiring the death of a privy counsellor to be felony. (*a*)

If a man only strike or wound one of these officers, tho in the execution of his office, this is a great misprision, for which in some cases the offender shall lose his hand (*b*), as was once done in the case of my lord chief justice *Richardson* sitting as justice of *oyer* and *terminer*, but it is not treason within this act.

II. This

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(*a*) But this act extends only to such offenders, as are the king's sworn servants, whose names are entered in the cheque-roll of the king's household, and who is under the state of a lord; and according to lord *Coke*'s opinion the conspiracy must be plotted to be done within the king's household. *Co. P. C. p.* 59. by this statute the offender was not deprived of the benefit of the clergy; but by 9 *Ann. cap.* 16. on occasion of *Robert Harley*, Esq (afterwards earl of *Oxford*) being stabd by *Anthony Guiscard*, who was then under examination before a committee of privy council, it was enacted, "That whoever should unlawfully attempt to kill, or should unlawfully assault, strike or wound a privy counsellor in the execution of his office, shall suffer death as a felon without benefit of clergy."

(*b*) 3 *Co. Inst.* 140.

II. This ſtatute extends to no other officers but thoſe above-named, and therefore not to the lord ſteward, conſtable, marſhal, admiral, or lord of parliament, tho in the exerciſe of their offices; it may be murder, but not treaſon. *Co. P. C. p.* 18.

A juſtice of peace, tho there be in the end of his commiſſion of the peace, *nec non ad diverſa felonias, malefacta audiend' & terminand'*, is not a juſtice of *oyer* and *terminer* within this act, for the juſtices of *oyer* and *terminer* are intended ſuch, as have their commiſſion *ad audiend' & terminand', &c.* as the principal deſignation of their office; and thus it is in divers ſtatutes alſo, that ſpeak generally of juſtices of *oyer* and *terminer*. (*c*)

But a juſtice of peace may be alſo a juſtice of *oyer* and *terminer* by another commiſſion, as many times they are, and then they are within this ſtatute, when they are ſitting by virtue of that commiſſion.

The lord keeper, when there is a lord chancellor alſo, as there may be both at the ſame time, ſeems not to be within this law; but if there be no lord chancellor, then the lord keeper is within this act, for by the ſtatute of 5 *Eliz. cap.* 18. their office is declared to be the ſame to all intents and purpoſes, as if the lord keeper were lord chancellor.

But the commiſſioners of the cuſtody of the ſeal (*d*) or for the treaſury are not lord chancellor or lord treaſurer within this act, and therefore at ſuch times as the treaſury hath been in commiſſion thoſe commiſſioners have not the ſame power as the lord treaſurer, as in caſes of writs of error by the ſtatute of 31 *E.* 3. *cap.* 12. (*e*) in the exchequer before the lord chancellor and treaſurer, and ſo for the ſetting of the prices of wines by the ſtatute of 7 *E.* 6. (*f*), neither do they ſit as lord treaſurer in the exchequer-chamber, as judges of equity.

It

(*c*) 9 *Co.* 118. *b. Cro. Eliz.* 87, 697.

(*d*) But it ſhould ſeem, that now they are within the act, ſince by 1 *W. & M. ſeſſ.* 1. *cap.* 21. their office is declared to be the ſame, and they to have the ſame juriſdiction and privileges, as lord chancellor.

(*e*) See alſo 31 *Eliz. cap.* 1.

(*f*) This power is given by 37 *H.* 8. *cap.* 23. which ſtatute was revived by the 5 & 6 *Ed.* 6. *cap.* 17. but there is nothing of it in the 7 *E.* 6.

It extends not to the chancellor and under treaſurer of the exchequer, nor to the chancellor of the county palatine of *Lancaſter*, nor to the lord privy ſeal, for theſe are ſpecial officers and of a lower rank, than the lord chancellor or treaſurer.

III. The *third* qualification of this treaſon is, that it muſt be *eſteants en lour places, feſant lour offices*; wherever the ſeal is open, whether in the court of chancery or in the chancellor's houſe, the chancellor or keeper there ſealing writs is *ſeant en ſon place, feſant ſon office.*

And the ſame law ſeems to be, if he be hearing of cauſes in his chamber, for tho antiently the hearing of cauſes upon *Engliſh* bills was rare, yet uſe hath ſufficiently obtaind to give it the ſtyle of *feſant ſon office.*

Quære, touching the lord treaſurer's diſpatching buſineſs in his houſe, whether this be *ſeant in ſon place*, but ſitting in the court of exchequer, or exchequer-chamber, or in the ſtar-chamber, when it ſtood, had been *ſeant in ſon place, &c.*

The place for the juſtices of the ſeveral courts are the courts themſelves, where they uſually or by adjournment ſit for the diſpatch of the buſineſs of their courts.

And ſo much ſhall ſuffice for this treaſon alſo.

CHAP. XXII.

Concerning principals and acceſſaries *in treaſon.*

BEfore I leave the diſcourſe concerning high treaſon it is neceſſary to conſider, whether or how all are principals in high treaſon.

In caſes of felony there are two ſorts of principals, *viz.* principals in the firſt degree, that do the fact, be it in murder or any other felony, and principals in the ſecond degree, that are preſent aiding and abetting the felony.

And regularly in felony there are two ſorts of acceſſaries, 1. Acceſſaries before the fact, which are not preſent, but yet counſelling, commanding, or abetting the felony, but in manſlaughter no ſuch acceſſaries can be before: and 2. Acceſſaries after, ſuch as knowing a felony to be done by ſuch a man do yet receive or maintain him, unleſs it be a wife receiving her huſband (*a*); of this hereafter in its due place.

Now in treaſon thus far it is agreed of all hands, 1. That there are no acceſſaries *à parte ante*, but all ſuch as counſel, conſpire, aid, or abet the committing of any treaſon, whether preſent or abſent, are all principals. 2. It is likewiſe agreed of all hands, that in all treaſons, except that which concerns counterfeiting the great or privy ſeal, or money, whoſoever knowingly receives, maintains, or comforts a traitor, is a principal in high treaſon. *Co. P. C.* 16, 138. and ſo it is there cited to be reſolved in the caſe of *Abington*, who received *Garnet*, that was one of the conſpirators in the powder treaſon: that which hath occaſioned the doubt hath been the reſolution in *Conyer's* caſe, *Dy.* 296. who was indicted, that *proditorie receptâſſet, &c.* Fairfax, *ſciens ipſum diverſas pecias monetæ ad ſimilitudinem monetæ* Angliæ *vocat'* ſhil-

(*a*) *Vide ſupra* p. 47.

lings *de falſo metallo fabricâſſe*; upon this he and others were diſcharged, becauſe it was miſpriſion of treaſon only, and not treaſon; but this opinion is contradicted by my lord *Coke*; *Pla. Cor. p.* 138. and yet it is ſaid by the ſame author, *Paſchæ* 9 *Jac.* 12 *Rep.* 81. the receiver of a counterfeiter of the ſeal or money is no traitor.

We will ſee therefore in what caſes an act *ex poſt facto* will be treaſon in relation to the aid of him, that committeth this or any other treaſon.

A man is impriſoned for treaſon, the gaoler voluntarily ſuffers him to eſcape, this is treaſon in the gaoler. *Stamf. Pl. Co.* 32.

If a perſon be arreſted for treaſon, he that reſcues him is guilty of treaſon.

And ſo if a man be impriſoned for treaſon, and another priſoner or any other perſon breaks the priſon, and lets out the party impriſoned for treaſon, this is treaſon in the party that breaks the priſon. 1 *H.* 6. 5. *Stamf. Pl. Cor.* 32. nay, if a ſtranger breaks the priſon, and lets out one there impriſoned for treaſon, this is held treaſon, tho he that breaks the priſon knew not that any there was impriſoned for treaſon; ſo reſolved by ten judges, *P.* 16 *Car. Croke* 583. *Benſted*'s caſe; but my lord *Coke* holds, that he muſt be knowing it. *Co. Mag. Cart. ſuper ſtatutum de frangentibus priſonam.* (*b*)

Rot. Parl. 2 *H.* 6. *n.* 18. *in ſchedula. Mortimer* was committed to the *Tower* of *London* for ſuſpicion of treaſon; and 23 *Feb.* 2 *H.* 6. was indicted, *quòd per covinam, confœderationem & aſſenſum* Willielmi King, *&c. pro diverſis denariorum ſummis eidem* Willielmo King *per præfatum* Johannem Mortimer *promiſſis, idem* Johannes *turrim prædict' falſo & proditorie fregit*: the indictment was removed into parliament, and *John Mortimer* likewiſe brought into the parliament: the commons deſired the duke of *Glouceſter* (then commiſſiond to hold the parliament) that the indictment might be affirmed, and that *John Mortimer de prædictis proditionibus & feloniis convincatur*: thereupon the duke and lords at the requeſt of the commons affirm the indict-

 ment

(*b*) 2 *Co. Inſt.* 590.

ment by act of parliament, *& quòd prædictus* Johannes Mortimer *de proditionibus & feloniis prædictis convincatur, & quòd trahatur per medium civitatis, & ſuper furcas de* Tyburne *ſuſpendatur, & ad terram projiciatur, & caput ejus amputetur, & interiora ſua comburantur, & corpus ejus in quatuor partes dividatur, & caput ejus ponatur ſuper portam pontis* London, *&c. & quòd bona & catalla, terras & tenementa ſua, tam in dominico, quàm in reverſione, domino regi forisfaciat.*

So that it ſeems, tho the ſtatute of 25 *E.* 3. ſpeak not of theſe offenſes, yet they are in a manner incidents, and virtually included within the original offenſe, and therefore theſe caſes of voluntary permiſſion to eſcape, reſcue, breach of priſon tranſlate the original offenſe upon him, that commits it by the common law; and theſe would be treaſons as well in the caſe of counterfeiting of coin, as other treaſons.

But herein theſe things are obſervable, 1. This judgment in *Mortimer*'s caſe is not at all now in force, nor binding, for the ſtatute of 1 *Mariæ* repeals not only enacted treaſons, but declared treaſons, that were not within 25 *E.* 3. and 2. That therefore at this day, if one be committed for ſuſpicion of treaſon, and another break gaol to let him out, yet unleſs the party impriſoned were really a traitor, this is no treaſon at this day. 3. But if he were really a traitor, then breaking of the priſon to enlarge him is treaſon, and a treaſon of a greater guilt, than a knowing receiver, and then it is treaſon by virtue of the common law, for it is a kind of incident; the like of a receiver of a traitor, or a gaoler that ſuffers him voluntarily to eſcape, thoſe are incident treaſons by the common law, and virtually included in the ſtatute of 25 *E.* 3. as well as a receiver of a traitor knowingly.

The differences therefore ſeem to be theſe, which ſtate and reconcile the whole matter.

Firſt as for new treaſons. If an act of parliament enact a new treaſon, and that the offender, his counſellors, abetters, and aiders thereunto ſhall ſuffer as traitors, this doth not make receivers or comforters after the fact guilty of treaſon, for *expreſſum facit ceſſare tacitum*; ſuch a clauſe we ſhall find

find in the ſtatute 23 *Eliz. cap.* 2. for a new felony (*c*), 5 *Eliz. cap.* 1. in caſe of a *præmunire.* (*d*)

If an offenſe be made treaſon in the offender, his procurers, counſellors, abetters, conſenters, (without the word *thereunto*) yet it ſeems to me for the ſame reaſon it doth not make the knowing receivers traitors, unleſs the words *receivers* or *comforters* be alſo inſerted: for the former words import an offenſe preceding or concomitant to the act of treaſon, but the latter words *receivers* and *comforters* are after the offenſe, and ſo of another nature: and this difference appears expreſly by the ſtatute of 13 *Eliz. cap.* 2. where *abetters, procurers,* and *counſellors* are made guilty of high treaſon; but *receivers* and *comforters* (*e*) after the fact are only within the ſtatute of *præmunire*; the like in 27 *Eliz. cap.* 2. where the coming of a prieſt, *&c.* is *treaſon,* but his receiver, aider or comforter is *felony:* ſo 5 *&* 6 *E.* 6. *cap.* 11. and 1 *Eliz. cap.* 5. *the offenders, their counſellors, abetters and procurers, and all and every their aiders and comforters knowing the ſame* extend to knowing receivers.

The word (*aid*) is of ſomewhat a more doubtful extent, yet we ſhall find in thoſe ſtatutes and ſome others the word *aid* to be applied to an aiding after the offenſe, and not in it or to it; but it ſeems to me, that when it is joined only with thoſe that import a conſent to the offenſe, (as *procurers, counſellors, aiders, abetters,* or *counſellors, conſenters and aiders*) as in the ſtatute of 5 *Eliz. cap.* 11. for clipping, 18 *Eliz. cap.* 1. for impairing, 1 *Mar. ſeſſ.* 2. *cap.* 6. for counterfeiting forein coin, it muſt be conſtrued of thoſe that are *aiders* in the offenſe, and not bare receivers of the perſon.

But in all new treaſons, thoſe that reſcue him from priſon or ſuffer him voluntarily to eſcape being lawfully committed to his cuſtody, tho theſe are not expreſly containd in that new act of treaſon, yet they are traitors by a neceſſary conſtruction of law upon the act itſelf; but if the act be general

making

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(*c*) The words of this ſtatute are, *counſellors, aiders, and abetters.*

(*d*) The words of this ſtatute are more extenſive, *viz. abetters, procurers, counſellors, aiders, aſſiſtants and comforters.*

(*e*) The words in this place of the ſtatute are, *aiders, comforters* or *maintainers.*

making a man a traitor for ſuch an act without mentioning in what degree his aiders, or abetters, comforters, or receivers ſhall be, it ſeems probable, that the receiver, knowing it, is thereby virtually made alſo a traitor; this, I ſay, ſeems probable, but moſt certainly procurers, conſenters, and aiders to the fact are thereby traitors, tho not ſpecially ſo enacted; this is agreed in *Conyer's* caſe, *Dy.* 296. *Co. P. C.* 16 & 138.

Secondly, As touching treaſons within the act of 25 *E.* 3. The procuring, counſelling, conſenting, or abetting ſuch treaſons, tho not ſpecially expreſſed in that ſtatute, is treaſon within that ſtatute. *Co. P. C. cap.* 64. *p.* 138. and ſo is the receiving of a traitor, or a gaoler's voluntary permitting him to eſcape, if he were in truth a traitor.

In caſe of the knowingly receiving of a perſon guilty of counterfeiting of coin, or of the great ſeal, there is diverſity of opinion, *M.* 12 & 13 *Eliz. Dy.* 296. and my lord *Coke* himſelf in his 12 *Rep. p.* 81. 9 *Jac.* ſays, that it is not treaſon, and yet *Pla. Cor. cap.* 64. *p.* 138. he holds it treaſon, tho this latter opinion is the more probable, the former is more merciful.

But in all other treaſons againſt the king within the ſtatute of 25 *E.* 3. the receiver of a traitor knowingly makes the receiver a traitor: this was *Abington's* caſe for receiving *Garnet* guilty of the powder treaſon. *Co. P. C. p.* 138.

Only this difference is to be obſerved, he, that being committed for treaſon breaks priſon, may be indicted for breaking of priſon before he be convict of the principal offenſe, for which he was committed, but not of treaſon, but it will be only felony by the ſtatute *de frangentibus priſonam*, for this ſtatute *de frangentibus priſonam* makes it not treaſon; and if it did, yet the ſtatute of 25 *E.* 3. makes it no treaſon, becauſe not within the ſame ſtatute, and conſequently 1 *Mar. cap.* 1. exempts it from being treaſon; but he, that reſcueth a perſon impriſoned for treaſon, or ſuffers him voluntarily to eſcape, ſhall not be arraigned for that offenſe, till the principal offender be convict of that offenſe; for if he be acquitted of the principal offenſe, the gaoler that ſufferd the eſcape,

and he that made the reſcue ſhall be diſcharged; and the like in felony. *Coke Mag. Car. ſuper ſtat. de frangentibus priſonam p.* 592. and the reaſon is, becauſe tho reſcuing a perſon charged with treaſon, or ſuffering him wilfully to eſcape be a great miſdemeanor, yet it is not treaſon, unleſs in truth and reality he were a traitor, for a man may be arreſted or impriſoned under a charge of treaſon, and yet be no traitor.

And tho the receiver of a traitor, knowing it, be a principal traitor, and ſhall not be ſaid an acceſſary, yet thus much he partakes of an acceſſary, 1. That his indictment muſt be ſpecial of the receipt, and not generally, that he did the thing, which may be otherwiſe in caſe of one, that is a procurer, counſellor, or conſenter; thus it was done in *Conyer*'s caſe, *Dy.* 296. 2. That if he be indicted by a ſeveral indictment, he ſhall not be tried till the principal be convicted (*f*), upon the reaſon of the gaoler and reſcuer before given, for the principal may be acquitted, and then he is diſcharged of the crime of receipt of him. 3. If he be indicted ſpecially of the receipt in the ſame indictment with the principal offender, as he may be, yet the jury muſt firſt be charged to inquire of the principal offender; and if they find him guilty, then to inquire of the receipt, and if the principal be not guilty, then to acquit both; and accordingly it was ruled in *Arden*'s caſe. (*g*)

L. Off. Cler. Pla. 88.

For tho in law they be both principals in treaſon, and poſſibly proceſs of utlary may go againſt him, that receives, at the ſame time as againſt him, that did the fact; and tho the principal appear, proceſs may go on againſt the other (otherwiſe in the caſe of an acceſſary in felony, *Stamf. Pla. Cor.* 47.) yet in truth he is thus far an acceſſary, that he cannot be guilty, if the principal be innocent.

How far *Mortimer*'s caſe agrees with law at this day, *videbimus infra, & vide ſupra.*

That

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(*f*) See *poſtea* Book II. *cap.* 28. And therefore the conviction of lady *Alice Liſle*, 1 *Jac.* II. was contrary both to law and reaſon, for that *Hicks* the principal (for harbouring whom ſhe was convicted of treaſon) was not at that time convicted, nor indeed was there any proof, that ſhe at that time knew he had been in the rebellion. *State Tr. Vol.* IV. *p.* 105.

(*g*) 1 *And. n.* 154. *p.* 109.

That, which will not make an acceſſary to felony after the fact, will not make a man principal in treaſon; therefore ſending of a letter for his deliverance, or ſpeaking a good word for him, *&c.* will not be treaſon. *Shamf. Pl. Cor.* 41. *b.* how far charitable relief will do it, *vide infra ſuper ſtatutum* 13 *Eliz. cap.* 1.

CHAP. XXIII.

Concerning forfeitures *by treaſon.*

HAving gone thro the ſeveral treaſons declared by this ſtatute, I ſhall now proceed to what follows in this ſtatute, which is, 1. Touching forfeitures of high treaſon. 2. Touching declaring of treaſon by parliament, and under this head ſhall conſider thoſe ſeveral declarations and new enacted treaſons ſince the ſtatute of 25 *E.* 3. and how they ſtand at this day.

The forfeitures for treaſon are either goods or lands.

As to goods: the king's prerogative as to goods forfeit for treaſon is the ſame as to forfeitures for felony, only there ſeems to be ſome difference in relation to grants thereof. 22 *Aſſ.* 49. The king grants to the maſter of St. *Leonard's Omnia bona & catalla tenentium ſuorum fugitivorum, & felonum qualitercunque damnatorum.* A tenant of the maſter's was convict and attaint for killing of the king's meſſenger, which at that time was held high treaſon; it was ruled, that the maſter ſhall not have the goods of this perſon by force of this general grant.

As to lands this ſtatute of 25 *E.* 3. goes farther, *Et ſoit ā entendus, qe les caſes ſuiſnoſmes doit eſtre adjugge treaſon, qe ſe extend a noſtre ſeigneur le roy & ſa royal majeſty, & de tiel manners de treaſons le forfeiture des eſchetes appertenont a noſtre ſeigneur le roy, ci bien de terres & tenements tenus des autres, come de lui meſme.*

I ſhall

I ſhall here examine, 1. Of what lands the king ſhall have the eſchete upon attainder of treaſon, and 2. In what manner or degree he ſhall have thoſe eſchetes. 3. Where a ſubject in point of privilege or franchiſe ſhall have theſe royal eſchetes.

I. As to the firſt of theſe, what lands are forfeit to the king by attainder of treaſon, my lord *Coke*, *Pl. Cor. p.* 19. gives a full account of them, which I ſhall repeat with ſome additional obſervations: 1. At common law the lands entaild were forfeited for treaſon, becauſe it was a fee-ſimple conditional; but by the ſtatute *W.* 2. *de donis conditionalibus* the forfeiture of lands entaild, even in caſe of treaſon, was taken away, and the general words of this ſtatute of 25 *E.* 3. doth not repeal the ſtatute of *Weſtm.* 2.

But ſome later ſtatutes have given to the king the forfeiture for treaſon of lands entaild: the ſtatute of 21 *R.* 2. *cap.* 3. did give the forfeiture of lands entaild to the king for the treaſons therein mentiond; but that ſtatute with the whole parliament of 21 *R.* 2. was repeald by the ſtatute of 1 *H.* 4. *cap.* 3.

By the ſtatute of 26 *H.* 8. *cap.* 13. *in fine* lands entaild are forfeited by attainder of treaſon, *viz.* "All ſuch lands, tene-
" ments and hereditaments, which any ſuch offender ſhall
" have of any eſtate of inheritance in uſe or poſſeſſion, by
" any right, title or means, within any of the king's domi-
" nions at the time of any ſuch treaſon committed, or at any
" time after, ſaving to all perſons, other than the offenders,
" their heirs and ſucceſſors, and ſuch perſons as claim to any
" of their uſes, all ſuch right, title, intereſt, poſſeſſion, *&c.*
" as they might have had if this act had not been made.

And by the ſtatute of 33 *H.* 8. *cap.* 20. (*a*), "That if any
" perſon be attaint of high treaſon by the courſe of the
" common law ſuch attainder ſhall be of as good force, as if
" it had been by parliament; and the king, his heirs and
" ſucceſſors ſhall have as much benefit by ſuch attainder, as
" well of uſes, rights, entries, conditions, as poſſeſſions, re-
" verſions, remainders and all other things, and ſhall be
" deemed

(*a*) See the cauſe of making this act, 3 *Co. Rep.* 10. *b.*

" deemed in the actual and real poſſeſſion of the lands, tene-
" ments, hereditaments, uſes, goods, chattles, and all other
" things of the offender, which his highneſs ought to have,
" if the attainder had been by authority of parliament, with-
" out any office or inquiſition to be found for the ſame, ſa-
" ving to all perſons, (other than the offenders and their
" heirs and aſſigns, and other perſons claiming by, from or un-
" der them or to their uſes after the treaſon committed) all
" ſuch right, title, uſe, poſſeſſion, entry, reverſion, remainder,
" intereſt, condition, fees, offices, rents, annuities, commons,
" leaſes, and all other commodities, and hereditaments what-
" ſoever, which they ſhould, might, or ought to have, if
" this act had not been made.

And the ſtatute of 5 & 6 *Ed.* 6. *cap.* 11. is to the ſame effect.

Theſe ſtatutes as to the forfeiture of lands entaild remain in force, and are not repeald by the ſtatute of 1 *Mar.* and ſo it hath been often ruled, and particularly by all the judges in the lord *Sheffield*'s caſe 21 *Jac. de quo poſtea.*

And the reaſon is, becauſe the ſtatute of 1 *Mar. cap.* 1. enacting, that no treaſon ſhall be but what was enacted by 25 *E.* 3. and that no pains of death, penalties or forfeitures ſhall enſue for doing any treaſon, other than be in the ſtatute of 25 *E.* 3. theſe words *other than be mentiond in the ſtatute of* 25 *E.* 3. refer to treaſons, not to forfeitures or penalties; and therefore tho by the ſtatutes of 26 and 33 *H.* 8. new penalties, *viz.* forfeitures of lands intaild, are introduced, this forfeiture is not repeald, but only new treaſons not mentiond in 25 *E.* 3. ſo that at this day, if tenant in tail be attaint of treaſon, the eſtate-tail is forfeited, and yet this attainder works no corruption of blood as in relation to the heir in tail: *vide* the lord *Lumley*'s caſe cited in *Dowtie*'s caſe, 3 *Co. Rep.* 10. *b.* Grandfather, tenant in tail, father, and ſon, the father is attaint of treaſon and dies, the grandfather dies, the land ſhall deſcend to the grandchild, for the father could forfeit nothing, for he had nothing to forfeit; and the ſtatute of 26 *H.* 8. that gives the forfeiture of tenant in tail, yet corrupts not the blood by the attainder of the father.

And therefore it is agreed in the principal caſe, that if after 26 *H.* 8. and before 33 *H.* 8. which veſts all in the king without office, if tenant in tail had been attainted of treaſon, and died in that interval, the land would have deſcended to his ſon till office found; but otherwiſe in caſe of tenant in fee-ſimple attainted and dying before office, the freehold is caſt upon the king without office, becauſe none could take it elſe.

2. The king at common law and by virtue of this ſtatute was entitled to a right of entry, where the party was in merely by diſſeiſin or abatement, but not to a right of entry, where the poſſeſſor was in by title; but at this day by virtue of the ſtatute of 33 *H.* 8. above-mentiond the king is entitled to a right of entry in both caſes, and that without office, but then there muſt be an inquiſition or ſeizure to bring the king into the actual poſſeſſion; and if he grant it over before ſuch ſeizure, the grant muſt be ſpecial, not of the land ſimply, but of the right to the land, otherwiſe neither land nor the right of entry paſſeth; it is ſo adjudged in *Dowty*'s caſe, 3 *Co. Rep.* 10. *b.*

3. If a perſon committing treaſon hath at the time of the treaſon committed a bare right of action touching any lands, or a right to reverſe a judgment given againſt him by writ of error, or a right to bring a formedon, or writ of entry, but hath no right of entry without ſuch recovery in ſuch action; this right neither at common law nor by the ſtatute of 33 *H.* 8. is given to the king by the attainder of treaſon, 3 *Co. Rep.* 3. *a.* marquis of *Wincheſter*'s caſe, 3 *Co. Rep.* 10. *b. Dowty*'s caſe ſo adjudged; but yet there have been two great caſes reſolved, that tread hard upon the heels of this judgment.

H. 15 *Eliz. Pl. Com.* 552. *b. Walſingham*'s caſe: *Wyat* tenant in tail of the gift of king *Henry* VII. the reverſion in the crown, made a feoffment in fee, and then was attaint of treaſon, and died leaving iſſue, tho the feoffor againſt his own feoffment could not claim any right at the time of the treaſon; yet it was adjudged, 1. That there remaind in him ſuch a right of the entail, as was forfeited to the king. 2. And that

that the king was in as of his reverſion, and ſhould not be ſubject to leaſes duly made by *Wyat* before his attainder.

21 *Jac. in Camera Scaccarii Stone* and *Newman*'s caſe, it was adjudged in *B. R.* and affirmed *in Camera Scaccarii* by the greater number of juſtices. *Bigott* tenant in tail general makes a feoffment to the uſe of himſelf and his heirs; and before the ſtatute of 26 or 27 *H.* 8. commits treaſon, and is attaint of treaſon, and dies leaving iſſue inheritable to the entail, then a ſpecial ſtatute is made 31 *H.* 8. whereby he was to forfeit all eſtates and rights; yet it was adjudged, 1. That againſt his own feoffment the tenant in tail could have no right, and therefore if the caſe had ſtood barely ſo, the right of the entail could not have been forfeited by the attainder. 2. But when an eſtate returns to him, that is forfeited by the attainder, the king ſhall hold this eſtate diſcharged of the right of the old entail, and that right ſhall never revive to the iſſue. 3. That the retroſpect of the king's title by the attainder ſhall over-reach and avoid the remitter, which was wrought in the iſſue before the king's actual ſeiſin by the attainder or office thereupon.

But it is to be noted, that if the king makes a gift in tail, ſaving the reverſion to himſelf, the attainder of treaſon of ſuch tenant in tail ſhall not bar his iſſue, becauſe the ſtatute of 34 *H.* 8. *cap.* 20. enacts, "That the heir in tail in ſuch "caſe ſhall have the lands, any recovery, or any other thing "or things hereafter to be had, done or ſufferd by or a-"gainſt ſuch tenant in tail to the contrary notwithſtanding"; which act coming after 26 *H.* 8. and 33 *H.* 8. that gave the forfeiture of lands entaild, is a repeal of thoſe ſtatutes as to this caſe, and a reſtitution of the ſtatute *de donis conditionalibus* in this ſpecial caſe: and therefore, where in *Plowden*'s *Commentaries* (*Walſingham*'s caſe) *Wyat*, who was tenant in tail of the gift of the crown, the reverſion in the crown, was attaint of treaſon 1 *Mar.* he had not forfeited his land by virtue of the ſtatutes of 26 or 33 *H.* 8. if there had been no more in the caſe; but in that caſe he loſt it, becauſe by a ſpecial act of 1 & 2 *Ph. & Mar.* that attainder was confirmed, and farther it was enacted, "That he ſhould forfeit all the "lands

" lands, tenements and hereditaments, whereof he or any to " his uſe was ſeized the day of the treaſon committed, ſa- " ving the right of all perſons other than the perſon at- " tainted and his heirs, and all claiming under them after " the treaſon committed;" and this act coming after 34 *H.* 8. *cap.* 20. repeald that act as to this caſe, as the act of 34 *H.* 8. repeald the acts of 26 and 33 *H.* 8. as to entails of the gift of the crown, where the reverſion continues in the crown.

But ſince all theſe ſtatutes it is enacted by the ſtatute of 5 & 6 *Ed.* 6. *cap.* 11. " That every offender being lawfully " convict of any manner of high treaſon according to the " courſe and cuſtom of the common law ſhall loſe and for- " feit to the king's highneſs, his heirs and ſucceſſors, all " ſuch lands, tenements and hereditaments, which any ſuch " offender or offenders ſhall have of any eſtate of inheritance " in his own right, in uſe, or poſſeſſion, within this realm " of *England*, or elſewhere within the king's dominions at " the time of ſuch treaſon committed, or at any time after:" this act coming after 34 *H.* 8. makes lands of the gift of the king in tail ſubject to forfeiture for treaſons, as well as other lands entail. 16 *Eliz. Dy.* 332. *b.*

4. At common law the king was not entitled to a condition, that was in the party attainted; but now by the expreſs words of the ſtatute of 33 *H.* 8. the king is in ſome caſes entitled to a condition of re-entry belonging to the party attainted, *viz.* not to the land itſelf but to the benefit of that condition, which might reduce the land into the poſſeſſion of the party attainted, if he had not been attainted, and now to the benefit of the king: but herein this difference is to be obſerved.

1. If the condition be ſuch, as that the ſubſtance of the performance thereof is not bound up ſtrictly to the perſon attaint, then ſuch a condition is given to the crown, and he may perform it, as the party himſelf might have done in caſe the condition hath a continuance.

7 *Co. Rep.* 11. *b. Englefeild's* caſe: Sir *Francis Englefeild* conveyed his lands to the uſe of himſelf for life, the remainder

to his nephew and the heirs male of his body, *&c.* with a *proviſo*, that in as much as he might turn prodigal, and therefore for a bridle to him, if Sir *Francis* by himſelf, or any other during his life, ſhould deliver or offer to his nephew a ring of gold to the intent to make void the uſes, then the uſes ſhould ceaſe: Sir *Francis* is attaint of treaſon; it was ruled, that the queen in the life-time of Sir *Francis* may by commiſſion, *&c.* tender the ring and make void the uſes, for it was not perſonally annexed to him, but might be performed by the queen.

This caſe was judged *M.* 33 & 34 *Eliz.* but it was not thought ſafe to rely upon this judgment; but 35 *Eliz. cap.* 5. there was a ſpecial act of parliament reciting the attainder and the conveyance with the proviſo: "And it is declared "and enacted, that the attainder be confirmed, and that the "queen was lawfully entitled to take benefit and advantage "of that proviſo in the ſame form, as Sir *Francis Englefeild* "might have done, and that the ſaid proviſo or condition "was well performed by the queen's commiſſion:" But ſuppoſe Sir *Francis* had died before the queen had made the tender, then the condition, which was only limited to him during his life had been determined, and the queen could not have tenderd, for the attainder could not lengthen the condition longer than the firſt limitation; but on the other ſide, if the condition be appropriated and applied to the perſon of the party attaint, then ſuch condition is not given to the crown.

The duke of *Norfolk*'s caſe 11 *Eliz.* (*b*) cited in *Englefeild*'s caſe to be adjudged and then agreed by the court: the duke conveyed land to uſes, provided that if he ſhall be minded to revoke, and ſhall ſignify his mind in writing under his proper hand and ſeal ſubſcribed by three witneſſes, that then the uſes ſhould be revoked; it was ruled, that this condition was not given to the crown by his attainder.

2 *Car.* 1. *B. R.* Sir *William Shelly* (*c*) made a feoffment to the uſe of himſelf for life, the remainder to his firſt, ſecond,

(*b*) 7 *Co.* 13. *a.*

(*c*) See this caſe by the name of *Warner* and *Hardwin* in *Latch* 25, 69, 102. *W. Jones* 134.

third, and other ſons in tail, provided, that if Sir *William Shelly* at any time during his life give or deliver, or lawfully tender to the feoffees or any of them, their heirs or aſſigns, a gold ring, or a pair of gloves of the price of twelve-pence, *ipſo* Willielmo *tunc declarante & expreſſante*, that the tender was to the intent to avoid the deed, that then it ſhould be void, and the feoffees ſhould ſtand ſeiſed to the uſe of Sir *William* and his heirs; and it was adjudged in the common pleas, that this condition was ſo perſonal, that it was not given to the king, but upon a writ of error in *B. R.* the court was divided; *Whitlock* and *Jones*, that it was given, *Croke* and *Dodderidge*, that it was not given to the king, *& ſic ſtetit.*

In the caſe of *Wheeler* and *Smith* (*d*), *Simon Mayne* being poſſeſſed of the rectory of *Haddenham* for ſixty years, in 1643. aſſigned it over to truſtees in truſt for himſelf for life, and afterwards to divers other truſts for payment of debts and other things, provided nevertheleſs and upon condition, that if the ſaid *Simon Mayne* ſhall at the time of his deceaſe have iſſue of his body, that then and from thenceforth the truſtees ſhall ſtand poſſeſſed for ſuch perſon and perſons, and ſuch eſtate and eſtates, as *Simon Mayne* by his laſt will and teſtament ſhall limit and appoint, and for want of ſuch limitation and appointment, in truſt for ſuch after-born child; provided alſo, that if the ſaid *Simon Mayne* ſhall hereafter during his life be minded to make void theſe preſent indentures, or any uſe or truſt therein, or to limit new uſes, and the ſame his mind ſhall declare or ſignify *under his hand and ſeal* in the preſence of two witneſſes, then the uſes ſhall ceaſe, and then the truſtees ſhall ſtand poſſeſſed to ſuch uſes, as he by ſuch deed or writing, or by his laſt will and teſtament in writing ſhall limit and appoint. *Simon Mayne* was guilty of the execrable murder of the king, had iſſue a ſon, was attainted, and died without making any ſuch will or revocation or declaration, and by act of parliament all the eſtates, which he had or any in truſt for him, and all rights, conditions, *&c.* were veſted in the crown, who granted this rectory to the duke of *York*, and by him the ſame was granted

4 to

(*d*) See this caſe reported 2 *Keb.* 564, 608, 644, 763, 772. 1 *Mod.* 26, 38.

to Sir *William Smyth*: it was adjudged in the common pleas, and upon a writ of error affirmed in the king's bench, *P.* 23 *Car.* 2. that Sir *William Smyth* had no title to this rectory: 1. That this was a perſonal condition and not given to the king, *under his hand* and *under his proper hand*, being all one in ſenſe and appropriate to his perſon. 2. That, if it were given, yet the ſame expiring by the death of *Mayne* could not be performed after his death by the king. 3. Admitting it might, yet nothing but the condition was in the king, and not the rectory itſelf, till the condition performed. 4. That conſequently the rectory paſſed not to the duke of *York*, becauſe the condition was not performed. 5. Neither the performance of the condition nor the benefit thereof paſſed to the duke by the general grant of the rectory, but it muſt have been ſpecially granted, or otherwiſe nothing paſſed. 6. That here was no eſtate in truſt for *Simon Mayne* longer than during his life, becauſe the whole reſidue of the truſt was out of him, and was not reducible back to him, but by a ſtrict performance of the condition or power, which was ſtrictly tied to the perſon of *Simon Mayne*, and determined by his death, and therefore not given to the crown; but if it had been given to the crown, and might by the crown be transferred to the patentee, yet it ſeems the patentee could not transfer or aſſign that condition over to another; but this laſt queſtion was not moved, as I remember, for the reſolution of the former points made an end of the caſe.

5. At common law the king by attainder of treaſon was not entitled to uſes or truſts belonging to the party attaint: thus it is recited to be the law by the ſtatute of 27 *H.* 8. *cap.* 10. and was one of the reaſons of the making of that ſtatute for transferring of uſes into poſſeſſion; and hence it was, that in ſome general acts touching treaſon, as that of 21 *R.* 2. *cap.* 3. and in moſt particular acts of attainder, that were made after that time, there was ſpecial proviſion made, that the parties attaint ſhould forfeit all the lands, whereof they or any other to their uſe were ſeized, and in moſt of thoſe acts proviſion was alſo made to ſave from forfeiture ſuch lands, whereof the perſons attaint were ſeized to the uſe of

any

any other, as may be ſeen in the acts of attainder: *vide Rot. Parl.* 1 *E.* 4. *n.* 18. 3 *E.* 4. *n.* 28, *&c.*

And yet, altho the ſtatute of 27 *H.* 8. *cap.* 10. had executed uſes into poſſeſſion, ſo that after that ſtatute all uſes were drowned in the land, yet there have ſucceeded certain equitable intereſts called truſts, which differ not in ſubſtance from uſes; nay, by the very ſtatute of 27 *H.* 8. *cap.* 10. they come under the ſame name, *viz. uſes* or *truſts.*

And by the ſtatute of 33 *H.* 8. *cap.* 20. there is a ſpecial clauſe, that the perſon attainted ſhall forfeit all uſes, *&c.* and the ſaving is to all perſons other than the perſon attainted, and his heirs, and all perſons claiming to the uſe of them or any of them.

And what other uſes there could be at the making of the ſtatute of 33 *H.* 8. but only truſts, ſuch as are now in practice and retained in chancery, I know not, and yet ſuch hath been the opinion of men, or rather their neceſſity in reſpect of frequent emergencies in eſtates and their diſpoſitions thereof, that theſe truſts ſince the ſtatute have not only been kept from being executed by the ſtatute of 27 *H.* 8. but have been held and uſed quite as other things different from uſes, and from all thoſe burdens, with which uſes were incumbred by ſeveral acts of parliament made before 27 *H.* 8.

And therefore *H.* 35 *Eliz. Croke, n.* 2. *B. R. Ridler* and *Punter* (*e*), ſuch a truſt not within the ſtatute of 3 *H.* 7. *cap.* 4. or any other ſtatute of that nature.

M. 16 *Jac. B. R. Croke, n.* 23. (*f*) the king made a leaſe for years to Sir *John Duncombe* of the proviſion of wines for the king, but in truſt for the earl of *Somerſet*, who was afterwards attainted of felony; by the opinion of all the judges the king ſhall have this truſt, and ſo if a perſon outlawed have a bond made to another in truſt for him, it ſhall be executed by an information in the exchequer-chamber or chancery; but it was agreed by them all, and ſo reſolved in *Abington*'s caſe, that a truſt, if a freehold, was not forfeited by attainder of treaſon.

4 But

(*e*) *Cro. Eliz.* 291. (*f*) *Cro. Jac.* 512. *Hob.* 214.

But how this reſolution in *Abington*'s caſe can ſtand with the ſtatute of 33 *H.* 8. I ſee not, for certainly the uſes there mentiond could then be no other than truſts, and therefore the equity or the truſt itſelf in caſes of attainder of treaſon ſeems forfeited by the ſtatute of 33 *H.* 8. upon an attainder of *ceſty qe truſt* of an inheritance, tho poſſibly the land itſelf be not in the king.

But indeed, where the king or a common perſon is entitled to an eſchete by an attainder of felony, there by the attainder of *ceſty qe truſt in fee-ſimple* the land nor truſt doth not come to the king or lord by eſchete, for the eſchete is only *ob defectum tenentis*, and in this caſe the king or lord hath his tenant, as before, namely the feoffee in truſt, who is to be attendant for the ſervices to the king or lord, and by the attainder of felony of the feoffee, the lord ſhall have his eſchete of the lands diſcharged of the truſt; and beſides, an attainder of felony is not within the ſtatute of 33 *H.* 8. *cap.* 20. and ſo it was reſolved by all the court in the exchequer, *M.* 21 *Car.* 2. wherein the caſe was thus. (*b*)

10 *Martii* 1 *Car.* 1. a long leaſe of the manor of *Bony Tracy* came to Sir *Ralph Freeman.*

4 *Car.* 1. The fee-ſimple thereof was conveyed to Sir *George Sands* and his heirs in truſt for Sir *Ralph Freeman.*

July 1633. Sir *George* having iſſue two ſons, *Freeman Sands* and *George Sands*, Sir *Ralph Freeman* deviſed part of the manor to *Freeman Sands* and his heirs, and other part thereof to *George* the ſon and his heirs, and deviſed all the reſt of the manor to *Freeman Sands* and *George* his brother, and all ſuch other ſons as Sir *George* ſhould have by *Jane* his wife, and their heirs, and made Sir *George Sands* and *Ralph Freeman* executors, and appointed them to convey the term according to theſe truſts.

Ralph Freeman the executor refuſed, Sir *George* took adminiſtration alone to him and his wife *cum teſtamento annexo.*

1635. *Freeman Sands* died without iſſue, *George* being his brother and heir.

(*b*) 1 *Sid.* 403.

Afterwards Sir *George* by *Jane* his wife had iſſue another *Freeman Sands*, but no conveyance was executed of the term or inheritance.

1655. *Freeman Sands* murdered his brother *George*, who dying without iſſue all that right or truſt, that was in *George* the brother, deſcended and ſurvived to *Freeman*.

7 *Aug.* 1655. *Freeman* the ſon was attainted of felony.

23 *Nov.* 1655. Sir *George* takes adminiſtration to his ſon *George*.

The land being held of the king, as of the manor of *Eaſt-Greenwich*, the king's attorney preferred an information againſt Sir *George Sands* in the exchequer-chamber to have a conveyance both of the term and inheritance to be executed by Sir *George Sands* unto the king, being the lord of whom the land was held; but it was *unâ voce* reſolved, 1. That as to the inheritance, tho there were a truſt for *George* the ſon, and that truſt deſcended unto *Freeman* the murderer, as his brother and heir, and was in him at the time of the death of his brother and at his attainder, as to the greateſt part of the lands, and as to the reſidue of the lands the truſt was originally for *Freeman Sands*, yet in as much as Sir *George Sands* continued ſeized of the fee-ſimple, and ſo was tenant to the king, tho ſubject to a truſt; yet the truſt eſcheted not to the crown, but Sir *George* held it diſcharged of the truſt. 2. That the term for years was not extinguiſhed in law by the acceſſion thereof to Sir *George*, as executor or adminiſtrator, tho Sir *George* had the fee-ſimple, becauſe it was *en autre droit*, that he had the term. 3. That if the term for years had been a term in groſs in truſt for the party attaint, then by the attainder of felony the king had been entitled thereunto, not in point of eſchete, but by his prerogative, having *bona & catalla felonum*. 4. But this term being to attend the inheritance the truſt thereof was not like the truſt of a chattle in groſs, but was to wait upon the inheritance (and otherwiſe it had been impoſſible for the greateſt part to have deſcended from *George Sands* to his brother *Freeman Sands*, unleſs it waited upon the truſt of the inheritance) therefore the inheritance remaining in Sir *George* now diſcharged

charged of the truſt by the attainder of *Freeman Sands* the truſt of the term ſhall alſo remain in him, for it is a kind of incident or appurtenant to the inheritance.

And in this caſe the caſe of Sir *Walter Raleigh* was cited, which was *Mich. 7 Jac. in Camera Scaccarii.* Sir *Walter Raleigh* being poſſeſſed of a long term for years of the manor of *Sherburn*, intending to obtain the inheritance aſſigned this term to his ſon an infant upon pretenſe for a truſt for his ſon, but really in truſt for himſelf.

Sir *Walter Raleigh* then purchaſed the inheritance and made a ſettlement upon his ſon, but the ſame was defective, whereby the fee-ſimple remained in Sir *Walter*.

1 *Jac.* Sir *Walter* was attainted of treaſon, and afterwards the king granted all the goods and chattles real and perſonal of Sir *Walter* to *Shelbury* and *Smith* in truſt for Sir *Walter*'s wife and children.

Sir *Walter Raleigh* was executed, and upon an information in the exchequer, *M. 7 Jac.* it is declared and decreed, that the leaſe was in truſt for Sir *Walter*, and therefore forfeited by his attainder, as well as if it had continued in him, and that it ſhould be cancelled, and not incumber the reverſion in fee-ſimple.

So that according to this reſolution this truſt for Sir *Walter* was not a chattel, for then it had paſſed to *Shelbury* and *Smith*; but it was a kind of appurtenant to the inheritance, and together with it was forfeited by the attainder, the conveyance of the inheritance being defective, and accordingly at this day it is held by thoſe, that derived under the patent of king *James*.

6. At common law the king by attainder of treaſon was not entitled to any chattles, that the party had *en autre droit*, as executor, or adminiſtrator, or in right of a corporation aggregate.

But the huſband poſſeſſed of a term in right of his wife forfeits it by attainder of treaſon, felony, or outlawry; but as to lands of inheritance, if the huſband be ſeized in right of his wife, and is attainted of treaſon, the king hath the freehold during the coverture; and ſo if tenant for life be attainted

tainted of treaſon, the king hath the freehold during the life of the party attainted; and ſo he had before the ſtatute of 26 *H.* 8. by the attainder of tenant in tail.

Touching forfeitures for treaſon by a corporation ſole, or aggregate, ſomewhat is obſervable.

At common law and ſtill to this day in the caſe of a corporation aggregate, as dean and chapter, mayor and commonalty, where the poſſeſſions are in common in the aggregate corporation, nothing was or is forfeited by the attainder of the head of the corporation, as the dean, mayor, *&c.*

At common law a ſole corporation, as an abbot, biſhop, dean, prebendary, parſon, vicar by attainder of treaſon forfeited to the king the profits of their abbey, biſhoprick, prebend during their incumbency; but their ſucceſſors were not bound by that forfeiture, for tho the profits, as they aroſe belonged to their perſons, yet the inheritance was in right of their church, and ſo not forfeited.

But by the general words of the ſtatutes of 26 and 33 *H.* 8. and by the excluſive ſaving of the rights of others, *other than the ſucceſſors of the perſons attaint*, theſe ſole corporations forfeited the inheritance, and their ſucceſſors were bound by ſuch attainder; for it is apparent that *H.* 8. had not only in proſpect the diſſolution of monaſteries, but had a reſolution to curb the clergy, who were too obſequious to the pope and his power.

And therefore there were ſeveral attainders of abbots of high treaſon, whereupon the king ſeized their poſſeſſions, as diſſolved thereby, as appears by the ſtatutes of 27 *H.* 8. *cap.* 28. and 31 *H.* 8. *cap.* 13. touching monaſteries, tho the king reſted not barely upon ſuch attainders; but by the ſtatutes of 27 and 31 *H.* 8. their poſſeſſions are ſettled in the crown by thoſe acts, and with this agrees the book of *Dy.* 289.

And therefore we may obſerve in the ſtatute of 1 *Mar. ſeſſ.* 2. *cap.* 16. for the attainder of the archbiſhop of *Canterbury* a cautious proviſo was added, that it ſhould not prejudice his ſucceſſors touching the poſſeſſions of his ſee; this was to avoid the queſtion, that otherwiſe might have ariſen upon the general words of the forfeitures thereby enacted.

But now by the act of 5 & 6 *Ed.* 6. *cap.* 11. this matter ſeems to be ſettled; for whereas by the ſtatute of 26 *H.* 8. *cap.* 12. a perſon attaint of treaſon is to forfeit all the lands, which he had by any right, title or means, ſaving the right of others, other than the heirs and ſucceſſors of the perſon attaint, which confiſcated the inheritance of ſole corporations attaint of treaſon, the ſtatute of 5 & 6 *E.* 6. *cap.* 11. enacts ſpecially, that perſons attaint of treaſon ſhall forfeit the lands, which they have of any ſtate of inheritance in their own right, and ſaves the right of all perſons, other than the perſons attaint and *their heirs*, which reſtores and preſerves the right of *ſucceſſors*, as it was at common law.

7. By the common law all hereditaments, whether lying in tenure or not, as rents, advowſons, commons, corodies certain, are forfeited to the king by attainder of treaſon; but ſuch inheritances, as lie purely in privity, appropriate to the perſon, are not forfeited neither at common law, nor by any ſpecial ſtatute, as a founderſhip, or corody uncertain.

8. At the common law by attainder of felony or treaſon of the huſband the wife loſt her dower: by the ſtatute of 1 *E.* 6. *cap.* 12. no attainder of treaſon or felony excludes her dower; but by the ſtatute of 5 & 6 *E.* 6. *c.* 11. the huſband attaint of treaſon the wife ſhall loſe her dower; and ſo it ſtands at this day, except in treaſons enacted by particular ſtatutes, where dower is ſaved to the wife, notwithſtanding the attainder of her huſband of treaſon, as upon the ſtatute of 5 *Eliz. cap.* 11. for clipping money, 18 *Eliz. cap.* 1. for impairing money, 5 *Eliz. cap.* 1. refuſing the oath of ſupremacy the ſecond time, and ſome others.

And thus far concerning the things forfeited by attainder of treaſon, now.

II. I ſhall conſider in what kind or degree the king hath theſe forfeitures of lands.

1. Altho theſe be called royal eſchetes, yet the king is not in purely as by an eſchete, for he hath thoſe forfeitures *in jure coronæ* of whomſoever the lands be immediately held; yea, tho they are held immediately of the king, he hath them not in point of eſchete, but *jure coronæ* or *prærogativa regalis*.

47 *E.* 3. 21. *b.* A manor is held of the king as of his honor of *D.* and the manor eſchetes for the felony of the tenant, it is now parcel of the honor, and therefore by the book if the king grant it out again generally, it ſhall be held of the honor, but if it eſchete for treaſon, it is no parcel of the honor, and if it be granted out generally it ſhall be held *in capite*, 6 *E.* 3. 32. *a. accordant adjudge: vide* the caſe of *Saffron Walden*, *More's Rep. n.* 301. (*i*) *& ibidem n.* 405. the caſe of the borough of *Southwark.* (*k*)

2. Where land comes to the crown by attainder of treaſon all meſne tenures of common perſons are extinct; but if the king grant it out, he is *de jure* to revive the former tenure, for which a petition of right lies. 46 *E.* 3. 19. (*l*)

3. If tenant in tail of the gift of the king, the reverſion in the king, make a leaſe for years, and then is attainted of treaſon, the king ſhall avoid that leaſe, for the king is in of his reverſion, tho the tenant in tail have iſſue living: this hard caſe is ſo adjudged in Commentaries *Auſtin's* caſe (*m*) *in fine*, and yet if ſuch tenant in tail had after ſuch leaſe bargained and ſold, or levied a fine to the king, he ſhould be bound by ſuch leaſe as long as there is iſſue. *H.* 22 *Jac. B. R. Croker* and *Kelſy* (*n*), 1 *Rep. Alton Woods* caſe. (*o*)

III. The *third* thing I propounded was the conſideration of the eſchetes in caſe of treaſon to ſuch as have royal franchiſes, or counties palatine, as *Durham*, *&c.*

1. At common law divers lords had by ſpecial grant or in right of their counties palatine royal eſchetes of the lands held within their franchiſes of perſons attaint of treaſon againſt the king.

Such was the royal franchiſe of the manor of *Wreck* in *John Darcy's* caſe, 6 *E.* 3. 31. *b.*

It appears in the parliament-roll 9 *E.* 2. *m.* 8. that the biſhop of *Durham* claimed among divers franchiſes between the waters of *Tyne* and *Teſe*, and *Norhamſhire* and *Bedlingtonſhire* in the county of *Northumberland*, the forfeitures of war, namely the

(*i*) *Mo.* 159.
(*k*) *Mo.* 257.
(*l*) I take it this ſhould be *H.* 46 *E.* 3. *Petition* 19.
(*m*) *Plowd.* 560. *a.*
(*n*) *Cro. Jac.* 688. 1 *R. A.* 843.
(*o*) 2 *Co.* 40. *b.*

the lands of thoſe, who held lands within that precinct, who adhered to the enemies of the king.

And after many debates in parliament 2 *E.* 3. that liberty was allowed him by the judgment of the king and his council in parliament.

Clauſ. 1 *E.* 3. *part* 1. *m.* 10. and *p.* 2. *m.* 20. the precedents of the allowance of that liberty being produced, *viz.* that *Anthony* biſhop of *Durham* had the forfeiture of *Caſtrum Bernardi* by the forfeiture of *John de Baliol*, the manors of *Hert* and *Hertneſs* by the forfeiture of *Robert Bruce*, the manor of *Gretham*, that was *Peter* of *Montfort*'s; and, upon the conſideration of the ſeveral pleadings in thoſe caſes, *concordatum eſt per nos & totum concilium noſtrum in ultimo parliamento, quòd epiſcopus habeat ſuam libertatem de hujuſmodi forisfacturis juxta tenorem & effectum cartæ proavi noſtri, ideo vobis mandamus,* (*viz.* the *cuſtos* of theſe lands) *quòd de terris & tenementis infrà libertatem epiſcopatûs prædicti, & in prædictis locis de* Norhamſhire & Bedlingtonſhire *in manus noſtrâ & in cuſtodiâ noſtrâ per forisfacturam guerræ exiſtentibus manum noſtram amoventes vos ulterius de eiſdem non intromittatis,* and the like particularly after *Clauſ.* 1 *E.* 3. *part* 2. *m.* 20. an *amoveas manum* for all the lands of *Guido de Bello Campo Comes* Warwick, *quæ de rege tenuit in capite infrà libertatem epiſcopatus* Dunelmenſis, and likewiſe for the manors of *Gainsford*, *Hert* and *Hertneſs* in the hands of *Roger de Clifford* ſeiſed for the forfeiture of war of *John de Baliol* and *Robert Bruce*; only the patentees not to be put out without an anſwer.

So that it is apparent, that at common law the biſhop of *Durham* had the royal forfeitures of war (which was treaſon) for ſuch lands as were within his liberty, tho they were formerly held of the king immediately *in capite*, if they lay within the precinct of his county palatine; and tho by the ſtatute of 7 *E.* 6. the ſaid biſhoprick was diſſolved, yet by the ſtatute of 1 *Mar. parl.* 2. *cap.* 3. that act is repeald and the biſhoprick with its franchiſes revived.

2. Yet farther, tho this act of 25 *E.* 3. declares, that all ſuch forfeitures belong to the king, yet this act did not derogate from the franchiſe of the biſhop of *Durham* or others, that

that had that royal liberty of forfeitures for treaſon, becauſe it was in effect but a declaration of the common law, or at leaſt an aſcertaining of it without prejudice to thoſe, that had theſe franchiſes of royal forfeitures, either by charter, or by reaſon of their county palatine by preſcription; and this is agreed by all the judges in the caſe of the biſhop of *Durham*, *P.* 12 *Eliz. Dy.* 288. and accordingly *Rot. Parl.* 1 *E.* 4. *n.* 20. *& ſequentibus*, where by act of parliament a great many noblemen, that were of the party of *H.* 6. were upon the coming of *E.* 4. to the crown attainted and their lands forfeited to the king; and ſuch as were within the county palatine of *Lancaſter* annexed to the duchy of *Lancaſter*, and the reſt lodged in the crown; yet there is a ſpecial proviſion and exception of the lands within the biſhoprick of *Durham*, *viz.* between the waters of *Tyne* and *Teſe*, and in the places called *Norhamſhire* and *Bedlingtonſhire* within the county of *Northumberland*, in which liberty and place the biſhop of *Durham* and his predeceſſors of time, whereof there is no memory, have had royal right and forfeiture of war in the right of the cathedral church of St. *Cuthbert* of *Durham*, as by concord in parliament in the time of the progenitors of our lord the king *Edward* IV. it hath been aſſented.

3. Altho by the ſtatute of 26 *H.* 8. and 33 *H.* 8. beforementiond it is enacted, that the king ſhall have the forfeiture of all lands, *&c.* of the perſons attainted of treaſon, yet in as much as in thoſe acts there is a ſaving of the rights of others, the forfeitures for all treaſons, that were within the ſtatute 25 *E.* 3. and conſequently were treaſons at common law, by tenant in fee-ſimple, are ſaved to the biſhop of *Durham* and thoſe, that have ſuch royal franchiſes of forfeiture of treaſons; for theſe ſtand as they did before by the opinion of five judges againſt four. *P.* 12 *Eliz. Dy.* 289. in the biſhop of *Durham*'s caſe.

4. But as to the forfeiture for new treaſons enacted by any of thoſe ſtatutes the lords of franchiſes ſhall not have their franchiſe; this was agreed by all: but thoſe new treaſons that were enacted in the time of *H.* 8. or before, are all repeald by the ſtatute of 1 *Mar. cap.* 1.

5. But as to treaſons, that ſtood by the ſtatute of 25 E. 3. and therefore not repeald by 1 *Mar. cap.* 1. yet as to the forfeitures of tenants in tail, or of lands in the right of churches or monaſteries, the perſon that hath *jura regalia* ſhall not have them, becauſe the king before the act of 26 *H.* 8. was not entitled to the forfeitures of thoſe eſtates; and the ſtatute of 26 *H.* 8. ſtands unrepeald as to the forfeitures for treaſons within the ſtatute of 25 E. 3. theſe are the points reſolved in that caſe of 12 *Eliz.*

And therefore it is obſervable, that in the ſtatutes of 5 *Eliz. c.* 11. whereby clipping is made treaſon, tho the forfeiture of lands is only during the offender's life, and no corruption of blood, nor loſs of dower, yet there are ſpecial proviſo's, that all perſons, which have any lawful grant to hold and enjoy the forfeitures of lands, tenements, goods or chattles of offenders, and men attaint of high treaſon within any manor, lordſhip, town, pariſh, hundred, or other precinct within the realm of *England* and *Wales* ſhall and may at all times have like liberty to take, ſeize, and enjoy all ſuch forfeitures of lands, tenements, goods, and chattles, as ſhall come or grow within their liberties by force of the attainder of any perſon upon any offenſe made treaſon by this act, as they might have done by virtue of any grant to them heretofore made.

I do not find the like clauſe to my remembrance in any other acts of new treaſon either in that of 1 *Mar. ſeſſ.* 2. *cap.* 6. for counterfeiting the privy ſignet or ſign manual, or in that of 1 & 2 *Ph. & Mar. cap.* 11. for importing forein counterfeit coin made current by proclamation, or in that of 18 *Eliz. cap.* 1. concerning waſhing of coin, nor in any of thoſe temporary acts made for the ſafeguard of the queen's perſon, &c. ſo that upon the reaſon of the reſolution of 12 *Eliz.* the patentees of goods or lands of traitors by patents granted before thoſe acts, and particularly the biſhop of *Durham*, whoſe claim is by preſcription, cannot have the goods or lands of perſons attainted for thoſe new treaſons: *vide* 13 *Eliz. cap.* 16. a ſpecial proviſion in the act of attainder of the earl of *Weſtmoreland* and others for the rebellion in the *North*,

that the queen ſhall have and hold againſt the biſhop of *Durham* and his ſucceſſors the lands, tenements, goods and chattles of the perſons attainted within the county palatine and franchiſe of the ſaid biſhop.

Nay, I cannot ſee how the biſhop of *Durham* can either by his antient charters or preſcription claim the goods or lands of perſons attaint for bringing in counterfeit coin contrary to the ſtatute of 25 *E.* 3. for it ſeems that that was not treaſon at common law, as may reaſonably appear by what has been before ſaid touching that ſubject.

CHAP. XXIV.

Concerning declaring of treaſons by parliament, *and thoſe treaſons that were enacted or declared by parliament between the* 25 *of* E. 3. *and the* 1 Mar.

ALtho the order of the ſtatute leads us to conſider of *petit treaſon* in the next place, yet becauſe I intend to abſolve the whole diſcourſe of high treaſon and miſpriſion of treaſon, before I deſcend to crimes of an inferior nature, I ſhall proceed to a full conſideration of the whole matter ſpecially relating to high treaſon, and ſo far as the ſame is not common to other capital offenſes: the ſtatute therefore proceeds, "And "becauſe many other like caſes of treaſon may happen in time "to come, which a man cannot think nor declare at this "preſent time, it is accorded, that if any other caſe ſup-"poſed treaſon, which is not above ſpecified, doth happen "before any juſtice, the juſtice ſhall tarry without going to "judgment of the treaſon, till the cauſe be ſhewed and declared

" before the king and his parliament, whether it ought to be " judged treaſon or other felony; and if *per caſe* any man of " this realm ride armed covertly or ſecretly with men of " arms againſt any other to ſlay him or rob him, or take " him or detain him, till he hath made fine or ranſom to " have his deliverance, it is not the mind of the king or his " council, that in ſuch caſe it ſhall be judged treaſon, but " ſhall be judged felony or treſpaſs according to the law of " the land of old time uſed, and according as the caſe re- " quireth, *&c.*

This clauſe conſiſts of two parts, the former, how treaſons not ſpecially declared by this ſtatute ſhall for the future be ſettled. 2. It declareth, that a particular offenſe therein mentiond, that was in truth formerly held to be treaſon, ſhall not for the future be taken to be ſo.

As to *the former* of theſe clauſes touching the declaring of treaſons not declared by this act, I ſhall purſue the hiſtory thereof at large in what follows, only at preſent I ſhall ſubjoin theſe few obſervations.

1. The great wiſdom and care of the parliament to keep judges within the bounds and expreſs limits of this act, and not to ſuffer them to run out upon their own opinions into conſtructive treaſons, tho in caſes, that ſeem to have a parity of reaſon (*like caſes of treaſon*) but reſerves them to the deciſion of parliament: this is a great ſecurity, as well as direction, to judges, and a great ſafeguard even to this ſacred act itſelf.

And therefore, as before I obſerved in the chapter of levying of war, this clauſe of the ſtatute leaves a weighty *memento* for judges to be careful, that they be not over haſty in letting in conſtructive or interpretative treaſons, not within the letter of the law, at leaſt in ſuch new caſes, as have not been formerly expreſly reſolved and ſettled by more than one precedent.

2. That the authoritative deciſion of theſe *caſus omiſſi* is reſerved to the king and his parliament, *viz.* the king and both his houſes of parliament, and the moſt regular and ordinary way is to do it by a bill declaratively; and therefore

altho

altho we meet with ſome declarations by the lords houſe alone in ſome particular caſes, as in that of the earl of *Northumberland anno* 5 *H.* 4. and that of *Talbot* 17 *R.* 2. tho they be deciſions and judgments of great weight, yet they are not authoritative declarations to ſerve this act of 25 *E.* 3. but it muſt be by the king and both houſes of parliament.

As to *the latter* of theſe it has been formerly diſcuſſed in the ſecond chapter.

This at common law was held treaſon, and the particular reaſon of the adding thereof in this place was in effect to reverſe the judgment given in *B. R. P.* 21 *E.* 3. *Rot.* 23. in Sir *John Gorbegge*'s caſe (*a*); and touching this whole matter of riding armed, *&c. vide quæ dicta ſunt ſupra cap.* 14. *p.* 135. *& ſeq.*

Only the printed ſtatute varies from the parliament-roll of 25 *E.* 3. *p.* 2. *n.* 17. for whereas it is printed in the late ſtatutes (*covertly or ſecretly*) the parliament-roll is *chivach armé deſcovert ou ſecretment*, and accordingly the old written manuſcript ſtatutes are written thus, *chivach armé deſcovert ou en privy en le realm, &c.* which miſprinting poſſibly hath made ſome miſtakes in judgments given of high treaſon, as if to ride privily and covertly upon ſuch a private attempt were not treaſon; but to ride diſcovert, openly, were treaſon, when in truth neither in one caſe or the other it is treaſon, neither at this day nor at common law, if it be only upon a particular or private quarrel, as in the caſe of 20 *E.* 1. between the earls of *Glouceſter* and *Hereford* (*b*); and this of *Gerbegge*, tho it were *more guerrino & vexillis explicatis.*

But now to reſume what is before promiſed, *viz.* touching the firſt matter, namely treaſons not declared by the ſtatute of 25 *E.* 3. we ſhall find, that between that ſtatute and 1 *Mar.* there were treaſons enacted or declared of theſe kinds:

1. Such as were ſimply declarative treaſons, or ſo many expoſitions of the ſtatute of 25 *E.* 3.

2. There were new treaſons, that were ſimply enacted, and not declared only, that were perpetual in their inſtitution, but repeald by the ſtatute of 1 *Mariæ.*

3. There

(*a*) *vide antea p.* 80. & 138. (*b*) *ſupra p.* 133. *Rgl. plac. parl. p.* 77.

3. There were new treaſons, that ſeem only temporary or fitted to the reigns of thoſe kings, in whoſe time they were made.

4. There were ſome treaſons, that were perpetual, but more explicite declarations or rather expoſitions of the ſtatute of 25 *E.* 3. which yet ſtand repeald by the ſtatute of 1 *Mar.*

And here I muſt adviſe the reader to take notice of theſe cautions.

1. Becauſe the hereafter mentiond ſtatutes are many, and conſiſting of divers clauſes, that he rely not barely upon the abſtracts thereof here given, becauſe poſſibly there may be miſtakes or omiſſions in thoſe abſtracts, but peruſe the ſtatutes themſelves in the books at large.

2. That tho generally it be a fair topical argument, that when offenſes are made treaſons by new and temporary acts, they were not treaſons within the ſtatute of 25 *E.* 3. for if they were, they needed not to have been enacted to be treaſon by new ſtatutes, as introductive of new laws in ſuch caſes, yet that doth not hold univerſally true, for ſome things are enacted to be treaſon by new, yea and temporary laws, which yet were treaſon by the ſtatute of 25 *E.* 3. as will appear in the ſequel.

And therefore the ſtatutes of 1 & 2 *Ph. & M. cap.* 3. 1 *E.* 6. *cap.* 12. 23 *Eliz. cap.* 2. making ſeveral offenſes felony have this wary clauſe, *the ſame not being treaſon within the ſtatute of* 25 *E.* 3.

And hence it was, that whereas by the ſtatute of 13 *Eliz. cap.* 1. compaſſing the queen's death and declaring the ſame by writing or printing is enacted to be treaſon during the queen's life, but the delinquent is by that ſtatute to be charged therewith within ſix months, and *Throckmorton* was generally indicted for compaſſing the queen's death, and the overt-act was by making a writing declaring convenient landing places for the *Spaniſh* forces, and the naming of divers popiſh gentlemen in writing, who would be aſſiſtant to that deſign, and communicating it to the *Spaniſh* embaſſador, and *Throckmorton* excepted to the proceeding, becauſe not within ſix months according to the ſtatute of 13 *Eliz.* that exception was

over-ruled, becauſe it was a charge of treaſon and an overt-act within the ſtatute of 25 *E.* 3. which hath no ſuch reſtriction, and thereupon he was convict and executed. *Camd. Annals ſub anno* 1584. *p.* 298. and the like was done upon the like exception in the caſe of the earl of *Arundel*; *quod vide Camd. Annals ſub anno* 1589. *p.* 426.

3. But where an act of parliament made for the ſafety of the king or queen's perſon or government enacts any offenſe to be felony only, or a miſdemeanor only puniſhable by fine and impriſonment, without that wary clauſe above mentiond, it is a great evidence and preſumption, that the ſame was not treaſon before, and a judgment of parliament in point, for it can never be thought, that the parliament would in ſuch caſes abate the extent of 25 *E.* 3. or make that leſs than treaſon, which was treaſon by that act.

I ſhall as near as I can purſue the order above mentiond, but ſome intermixtures there will neceſſarily be of the many particular treaſons enacted by ſome ſtatutes, ſome of which were within the ſtatute of 25 *E.* 3. and I ſhall follow thoſe in every ſucceeding king's reign.

In the time of king *Edward* III. I find no declarations of treaſon after the ſtatute of 25 *E.* 3.

Only I find ſomewhat like it in the attainder of *Thorp* chief juſtice of the king's bench for bribery (*c*) and other offenſes, who was thereupon ſentenced to death, before ſpecial commiſſioners (*d*) aſſigned *ad judicandum ſecundum voluntatem regis*, in reſpect of the oath he had made to the king and broken, whereby he had bound himſelf to that forfeiture, *ſi ale encountre ſon ſerement*: it is true he had judgment, but there was no execution; this judgment and the whole proceeding is entred in patent-roll of 24 *E.* 3. *part* 3. *m.* 3. *dorſ.* and was afterwards removed into the lords houſe in the parliament held *in octabis purificationis* 25 *E.* 3. which was a year before the parliament held *Wedneſday* in the feaſt of St. *Hillary* 25 *E.* 3. wherein the declaration of treaſon was made; and

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(*c*) He was juſtice of aſſize *in com' Lincoln*, and took bribes of ſeveral to ſtay an exigent upon an indictment for felony, that ſhould have iſſued againſt them.

(*d*) The earls of *Arundel*, *Warwick*, &c.

in that parliament of *octabis purificationis*, *n.* 10. the judgment was affirmed good, *de puis qe ſe obligea meſme par ſon ſerement a tiel pennance, ſil fait al encountre, & conuſſeit, quil avoit receive doums countre ſon dit ſerement*: but with this caution for the future to prevent ſuch an arbitrary courſe of proceeding, *& ſur ceo y fuit accord par les grants de meſme le parlement, qe ſi nul tiel caſe aueigne deſore en avant de nul tiel, que noſtre ſeigneur le roy prigne devers lui des grants, qe lui pierra, & par lour bone avyſe face outre ce qe pleſe a ſa royal ſeignory* (*e*); but this comes not to our purpoſe concerning treaſon.

As to the time of *R.* 2. it was a fruitful time for declaring and enhanſing of treaſon in parliament. *Rot. Parl.* 3. *R.* 2. *n.* 18. *pars* 1. the caſe of *Jean Imperiall* (*f*) who was ſent as agent from the duke and commonalty of *Genoa*, and coming hither by the king's ſafe conduct was murdered; the inquiſition before the coroner was brought into parliament, and in purſuance of this clauſe of 25 *E.* 3. it was declared by the king, lords and commons, to be treaſon.

This declaration being by the king and both houſes of parliament was a good declaration purſuant to the act of 25 *E.* 3. but is not of force at this day, 1. Becauſe it was but a particular caſe, and extended not to any other caſe, as a binding law but only as a great authority. 2. Becauſe it being not within the expreſs proviſion of the ſtatute of 25 *E.* 3. it ſtands wholly repeald as treaſon by the ſtatutes of 1 *E.* 6. and 1 *Mariæ.*

Rot. Parl. 1 *R.* 2. *n.* 38. the judgment againſt *Gomeneys* and *Weſton* for betraying the king's caſtles in *France* mentiond before *cap.* 15. *p.* 168. where *Weſton* had judgment to be drawn and hanged; this judgment was given by the lords at the petition of the commons in parliament, but makes not much in the point of declaration of treaſon, becauſe, 1. If done, as is ſuppoſed, by treachery and bribery, it was an adherence to the king's enemies. 2. Being a declaration or judgment only by the lords, and not formally by the king, lords and commons, it

(*e*) There is likewiſe a proviſo added, that this ſhould not be drawn into precedent, *ſed ſolummodo verſus eos, qui prædictum ſacramentum fecerunt & fregerunt, & habent leges Angliæ regales ad cuſtodiendum.*

(*f*) *Co. P. C. p.* 8. *vide ſupra p.* 83.

it is not ſuch a declaration of treaſon, as the act of 25 *E.* 3. requires in caſes of treaſon not thereby declared.

Rot. Parl. 11 *R.* 2. *pars* 2. *per totum*, the great appeal in parliament by the duke of *Glouceſter* and others againſt the archbiſhop of *York*, duke of *Ireland*, *Treſilian*, *Uske*, *Blake*, *Holt*, and others containing divers articles, which ſurely were not treaſon within the ſtatute of 25 *E.* 3. yet had judgment of high treaſon given againſt them by the lords in parliament. (*g*)

Upon the impeachment of the commons againſt *Simon Burle*, *Beauchamp*, and others, many of them had likewiſe judgment of high treaſon given againſt them by the lords in parliament. (*)

Altho the king did in ſome kind outwardly agree to theſe judgments, and the commons were active in it, and *Rot. Parl.* 11 *R.* 2. *pars* 1. *n.* 50. public thanks were given to the king by the lords and commons in full parliament, *de ceo, qil lour avoit fait cy plein juſtice*, yet this was no declaration of parliament of treaſon purſuant to the ſtatute of 25 *E.* 3. becauſe the king and commons did not conſent *per modum legis declarativæ*, for the judgment was only the lords. 2. Becauſe it was but a particular judgment in a particular caſe, which was not concluſive, when the like caſes came before judges.

This parliament of 11 *R.* 2. was repeald by the parliament of 21 *R.* 2. and that of 21 *R.* 2. alſo repeald, and the parliament of 11 *R.* 2. enacted to be holden according to the purport and effect of the ſame by the ſtatutes of 1 *H.* 4. *cap.* 3 & 4. but this did not alter the ſtatute of 11 *R.* 2. and make thoſe judgments, which were given by the lords in 11 *R.* 2. of any other value than they were, and conſequently amounted not to any declaration by parliament, that theſe which the lords adjudged treaſons in 11 *R.* 2. were or ought to be ſo held; and if any ſuch conſtruction might be made upon the confirmation of 1 *H.* 4. *cap.* 4. yet the ſame was repeald by the ſtatute of 1 *H.* 4. *cap.* 10. in the ſame parliament; and if not, yet certainly 1 *E.* 6. and 1 *Mar.* have wholly taken away the force of thoſe declarations, as ſhall be ſhewed.

2 *Rot.*

(*g*) See *State Tr. Vol.* I. *p.* 1. (*) *Ibid. p.* 13.

Rot. Parl. 17 *R.* 2. *n.* 20. *Talbot*'s caſe, in conſpiring the deſtruction of the dukes of *Aquitain* and *Glouceſter* the king's uncles, and other great men, *Et ſur ce firent divers gents lever armies & arrayes a faire guerre en aſſembles & congregations in tres grand & horrible numbre*: this was declared treaſon by the lords in parliament, and a proclamation iſſued to render himſelf, or otherwiſe to be attainted of treaſon: how far this was treaſon or not within the ſtatute of 25 *E.* 3. hath been before conſidered, but certainly, if it were no treaſon declared by the particular purviews of 25 *E.* 3. it is no ſuch authoritative declaration of treaſon in parliament, as this act requires in treaſons not declared; and if it were ſuch an authoritative declaration, it binds not now as ſuch, becauſe all treaſons are reduced to thoſe expreſſed in the ſtatute of 25 *E.* 3. by the ſtatutes of 1 *H.* 4. *cap.* 10. 1 *E.* 6. *cap.* 12. 1 *Mar. cap.* 1. and treaſons declared, as well as new treaſons enacted, are by theſe ſtatutes ſet aſide, farther than the very declaration of 25 *E.* 3. extends.

Rot. Parl. 21 *R.* 2. *quod vide inter ſtatuta* 21 *R.* 2. *cap.* 2, 3, 4, 12. ſome new ſtatutes of treaſon were enacted, others were declared; by *cap.* 2. it is enacted, that the procurers of any new commiſſion like that, (for the obtaining of which the archbiſhop of *Canterbury*, *&c.* were in that parliament attainted) being convict in parliament ſhould be guilty of high treaſon: again, *cap.* 3. If any be convict in parliament of the compaſſing of the king's death, or to depoſe him, or to render up his homage to him, or of raiſing war againſt the king; and *cap.* 4. The procurers or counſellors to repeal the judgments given in that parliament, if convict in parliament, are guilty of high treaſon: other treaſons were declared, as namely thoſe nine rank anſwers to the king's queſtions, which are all recited and affirmed, and adjudged good and ſufficient by the 12th chapter of that parliament; other points were judged, as namely, that the procuring of the commiſſion for regulating the miſcarriages in government *anno* 7 *R.* 2. and the execution thereof by the archbiſhop of *Canterbury* and others was high treaſon.

And tho it is true, that ſome of the points enacted to be treaſon by the 3d chapter were in truth treaſons by the ſtatute of 25 *E.* 3. if there were an overt-act, namely compaſſing the death, or depoſing the king, or levying war, yet theſe ſtatutes and theſe declarations by the parliament of 21 *R.* 2. are wholly ſet aſide; and the ſtatute of 25 *E.* 3. governs the whole matter of high treaſon, notwithſtanding any of the extenſions, enactings, or declarations of the parliament of 21 *R.* 2. or any of the judges therein mentiond, *viz. Belknap, Treſilian, Holt, Fulthorp, Burgly, Thirlinge, Bikhill* and *Clopton*, for the parliament of 21 *R.* 2. is wholly repeald by 1 *H.* 4. *cap.* 3 *&* 4. and the parliament of 11 *R.* 2. wherein *Belknap* and *Treſilian* were judged traitors for delivering thoſe extravagant opinions (*b*) is revived and affirmed; and alſo by the ſtatutes of 1 *E.* 6. and 1 *Mar.* the treaſons enacted or newly declared by the parliaments of 11 *&* 21 *R.* 2. are repeald.

And tho thoſe opinions of the judges *Treſilian, Thirlinge* and the reſt had the countenance of the parliament of 21 *R.* 2. yet they had the diſcountenance of the parliament of 11 *R.* 2. and 1 *H.* 4. which repeald the parliament of 21 *R.* 2. and ſtand at this day unrepeald in their full ſtrength, excepting only ſuch treaſons as were newly made, or newly declared by thoſe parliaments: tho the ſtatutes of 1 *E.* 6. and 1 *Mar.* have taken away thoſe treaſons, which either the ſtatute of 11 *R.* 2. or 1 *H.* 4. had introduced more than were in the ſtatute of 25 *E.* 3. yet it hath not taken away the efficacy of the parliaments of 11 *R.* 2. and 1 *H.* 4. as to their declarations, that the extrajudicial opinions of thoſe judges were falſe and erroneous; but in that reſpect the parliaments of 1 *H.* 4. and 11 *R.* 2. are of force, as to the damning of thoſe extravagant and unwarrantable opinions and declarations.

I come now to the time of *Henry* IV. wherein I find little: *in anno primo* in parliament *inter Placita Coronæ*, *John Hall* was convict before the lords in parliament of the murder of the duke of *Glouceſter*, and judgment given by the lords *per aſſent du roy*, that altho it were only murder, yet the offender ſhould have the judgment of high treaſon, *viz.* to be drawn, hanged,

(*b*) *Co. P. C. p.* 22.

hanged, embowelled, his bowels burnt, his head cut off, and quartered, and his head ſent to *Calice*, where the murder was committed, which was executed by the marſhal accordingly: this was no declaration of treaſon, but a tranſcendent puniſhment of the murder of ſo eminent a perſon.

1 *H.* 4. *cap.* 10. "It is accorded, that in no time to come "any treaſon be judged otherwiſe than it was ordained by the "ſtatute of king *Edward* III." This at once ſwept away all the extravagant treaſons introduced in the time of *R.* 2. either in over much favour of popularity, or over much flattery to prerogative, for they were of both ſorts.

Rot. Parl. 5 *H.* 4. *n.* 12. There is a declaration of an acquittal of the earl of *Northumberland* from treaſon; *quod vide antea cap.* 14. *p.* 136. but I find no declaration nor act of new treaſon, in the time of *H.* 4. he was as good as his promiſe by the act of 1 *H.* 4. *cap.* 10. for he contented himſelf with the declaration made by 25 *E.* 3.

In the time of *H.* 5.

By the ſtatute of 2 *H.* 5. *cap.* 6. "It is ordained and de"clared that manſlaughter, robbery, ſpoiling, breaking of "truce, and ſafe conducts, and voluntary receipt, abetment, "procurement, concealing, hiring, ſuſtaining, and maintain"ing of ſuch perſons to be done in time to come by any "of the king's ſubjects within *England*, *Ireland*, or *Wales*, "or upon the main ſea ſhall be judged and determined treaſon done againſt the king's crown and dignity; and the "conſervator of the truce to have power by the king's com"miſſion and by the commiſſion of the admiral to inquire "thereof:" But this ſtatute as to treaſon is particularly repeald by the ſtatute of 20 *H.* 6. *cap.* 11. but whether the general ſtatutes of 1 *E.* 6. *cap.* 12. 1 *Mar. cap.* 1. had repeald it as to treaſons done upon the ſea may be a queſtion, becauſe it hath been ruled, that thoſe ſtatutes extend not as to trials of treaſon done upon the ſea by the ſtatute of 28 *H.* 8. *cap.* 15. *de quo infrà.*

The ſtatute 3 *H.* 5. *cap.* 6 & 7. it is true, is a declarative law, that clipping, waſhing and filing the king's coin is treaſon within the ſtatute of 25 *E.* 3. and judges of aſſiſe and juſtices of peace have cogniſance thereof; but even this declarative

rative law is repeald by the ſtatute of 1 *Mar.* as it is declared in the ſtatute of 5 *Eliz. de quo antea.*

As to the judgment of treaſon given in Sir *John Oldcaſtle's* caſe, *Rot. Parl.* 5 *H.* 5. *par.* 1. *n.* 11. tho the judgment be given in parliament, yet it is barely upon the account of compaſſing the king's death, and of levying of war, which was expreſly within the ſtatute of 25 *E.* 3. as appears before *cap.* 14. *p.* 142.

Touching the times of *H.* 6.

Rot. Parl. 2 *H.* 6. *n.* 18. It appears, that *John Mortimer* was committed for ſuſpicion of treaſon againſt *H.* 5. and 23 *Feb.* 2 *H.* 6. brake priſon, and eſcaped, for which he was indicted 25 *Feb.* 2 *H.* 6. at *Guildhall, London*, before commiſſioners of *oyer* and *terminer* ſetting forth the matter, and that *priſonam prædictam falſò & voluntariè fregit*; the record by the king's command was ſent into parliament, and by the king's commiſſioner *ad tenendum parliamentum*, and the lords at the requeſt of the commons, it was affirmed a good indictment, and *Mortimer* had judgment to be drawn, hanged and quartered, and his lands and goods forfeited to the king by the judgment of the lieutenant, lords, and commons, by an act made then for that purpoſe.

This it is true was an authoritative declaration of treaſon in this particular caſe purſuant to the clauſe of the ſtatute of 25 *E.* 3.

But it reſted not here, for in the ſame parliament, *n.* 60. a general ſtatute paſſed, " Que ſi aſcun perſon ſoit indite, " appelle ou priſe par ſuſpicion de grand treaſon & pur ceſt " cauſe ſoit commiſſe & detenus in priſon & eſcape volun- " terement hors du dit priſon, que tiel eſcape ſoit adjudge & " declare treaſon, ſi tiel perſon ent ſoit duement attaint ſe- " lon la ley de terre. Et eient les ſeigneurs de fee en tiel cas " les eſchetes & forfeitures de terres & tenements de eux " tenus par tiel perſons iſſint attaints, come de ceux, que " ſont attaints de petit treaſon; Et teigne ceſt eſtatute lieu " & effect del 20 jour de *Octobre* darrein paſſe tanque al pro- " chein parlament.

" Ro'. Soit fait, come eſt deſyre par la petition.

This parliament began 20 *Oct.* 2 *H.* 6.

The things obſervable hereupon are theſe, 1. That to reſcue a perſon, that is a traitor, out of priſon, was treaſon at common law, and ſo continues at this day within the ſtatute of 25 *E.* 3. 2 *Co. Inſtit. p.* 589. and 1 *H.* 6. 5. *b.* 2. But if a man committed for treaſon breaks priſon and eſcapes, this is not treaſon at common law. 3. Tho it be felony by the ſtatute *de frangentibus priſonam*, yet it is not made treaſon by that ſtatute. 4. But if it were treaſon by that ſtatute, yet it is corrected and made not treaſon by the ſtatute of 25 *E.* 3. and 1 *H.* 4. and therefore in this caſe it was made treaſon merely by the judgment of parliament, and ſtatute of 2 *H.* 6. was but temporary and expired by the next parliament. 5. That the judgment itſelf in *Mortimer*'s caſe, tho an authoritative declaration, was not at all binding in other caſes for two reaſons, 1. Becauſe it is checked and controld as to any ſuch effect by the general act of parliament of 2 *H.* 6. which was to continue only to the next parliament; and 2. Becauſe it was but a particular judgment of parliament in that particular caſe, to which it was particularly applied.

But howſoever, that queſtion is now put out of queſtion by the general act of 1 *Mar. cap.* 1. which enervates the force of this judgment and declaration; for 1 *Mar.* repeals declarative laws of treaſons as well as enacting laws, and leaves the judges to judge ſtrictly according to the ſtatute of 25 *E.* 3. as if no ſuch judgment had been given in parliament. 2 *Co. Inſtit. p.* 589. and therefore it ſeems ſtrange to me, that the judges took any notice of 2 *H.* 6. in *Benſted*'s caſe to ground any opinion on. (*i*)

And therefore, altho in the late act of attainder of the earl of *Strafford*, there was a proviſo added, that it ſhould not be conſtrued, that the treaſons therein charged ſhould be a rule for judges to proceed by in other caſes, it ſeems a cautious

 but

(*i*) *Cro. Car.* 383. *Jones* 455. It was the caſe in 1 *H.* 6. 5. *b.* and not the ſtatute of 2 *H.* 6. on which the judges grounded their opinion, altho as that opinion is expreſt in *Cro. Car.* 383. and *Kel.* 77. *viz.* that the breaking of a priſon, wherein traitors be, is high treaſon, tho the parties did not know, that there were traitors there, is not warranted by that caſe, which is of one, who brake priſon, *knowing certain perſons to be priſoners in the ſaid priſon for treaſon.*

but needleſs proviſo, becauſe it was a particular judgment, that did not *egredi perſonam*, and no general declarative law to ſerve the ſtatute of 25 E. 3. For there may be collateral reaſons not only in policy, but in juſtice ſometimes for a parliament to vary the puniſhment of crimes, in ſubſtance the ſame, when differenced by circumſtances, in ſeveral perſons.

8 H. 6. *cap.* 6. Burning of houſes maliciouſly or wickedly to extort ſums of money from thoſe, whom the malefactors ſpare, is made high treaſon with a retroſpect to the firſt year of the king's reign, ſaving to the lords their liberties, as in caſe of felony.

Two things are obſervable upon this act, 1. That had it not been ſpecially provided againſt, the lords had loſt their eſchetes by making it treaſon. 2. That this act, tho perpetual in its conſtitution, yet was repeald by 1 *Mar. cap.* 1. and after that repeal it remained felony, as it was before, and ſo continues to this day.

Rot. Parl. 11 H. 6. *n.* 43. A petition that *John Carpenter*, who had committed a barbarous murder upon his wife, for which he was outlawed and in priſon in the king's bench, might for example's ſake by authority of parliament be judged a traitor, and that the judges might give judgment againſt him to be drawn and hanged, ſaving to the lords their eſchetes. *Ro'. Pur ceo, quil ſemble encountre le liberty de ſeint eſglis le roy ſe aviſera.*

20 H. 6. *cap.* 3. The coming of people out of *Wales* or the marches of the ſame into the counties adjacent, and taking and driving away cattle, and their abetters and receivers knowing thereof, is made treaſon againſt the king, ſaving to the lords marchers, of whom the offenders, receivers or abetters held their lands, the forfeiture thereof and of their goods and chattles, when attainted; this act was to continue for ſix years: *nota*, the lords had loſt their eſchetes and forfeiture of the offenders goods, if it had not been ſpecially provided for, becauſe made treaſon and a new treaſon, which was not before, for the lord marchers had not only forfeiture of goods of felons, but royal eſchetes and forfeiture of traitors goods

for the moſt part; but that franchiſe, which was by preſcription, could not extend to new treaſons.

I find nothing more relating to this matter in the time of *Henry* VI.

The impeachment of the duke of *Suffolk* by the commons for treaſons and miſdemeanors contained many articles of high treaſon within the ſtatute of 25 *E.* 3. namely, *adhering to the king's enemies*; but the whole matter being at laſt left to the king, he was declared by the king clear of the treaſons, and for the reſt the king by a kind of compoſition orderd him to be baniſhed for five years. *Rot. Parl.* 28 *H.* 6. *n.* 18, 19, 20, *&c.*

As to the reigns of *Edward* IV. and *Richard* III. tho in thoſe great revolutions, that happend in the latter end of *Henry* VI. the beginning of *Edward* IV. the time of *Richard* III. there are many acts of attainder of treaſon of particular perſons, that adhered to either party then contending for the crown, according as the ſucceſs of war fell to one ſide or the other, as namely *Rot. Parl.* 38 *H.* 6. *n.* 1.—36, *&c.* many of the duke of *York*'s party were attainted of treaſon by act of parliament. *Rot. Parl.* 1 *E.* 4. *n.* 6.—15, *&c.* the numerous companies of the party of *Henry* VI. were attainted by parliament; the like was done in the ſhort regreſs of *H.* 6. 11. *E.* 4. in a parliament held in that ſhort reſumption of the crown by *Henry* VI. Again, the like was done in the parliament of 12 *E.* 4. upon the regreſs and re-expulſion of *Henry* VI. Again, *Rot. Parl.* 1 *R.* 3. divers perſons of great quality, that oppoſed the pretenſions of *Richard* III. were attainted by act of parliament; and the like was again done in the parliament of 1 *H.* 7. againſt the aſſiſtants of *Richard* III. Every new revolution occaſioned the attainder by parliament of the moſt conſiderable of the adverſe party; yet in all this time I find no general declaration or general enacting of new treaſons by parliament.

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But this act was repeald by the ſtatute of 1 *E.* 6. *cap.* 12. and 1 *Mar. cap.* 1. and another act made to the ſame purpoſe in 1 *Mar. ſeſſ.* 2. *cap.* 6.

This wiſe prince duly conſidering the various revolutions, that had formerly happened in this kingdom touching the crown eſpecially to the houſes of *York* and *Lancaſter*, and that every ſucceſs of any party preſently ſubjected all, that oppoſed the conqueror, to the penalties of treaſon, and weighing that, altho by his marriage with the heir of the houſe of *York* he had reaſonably well ſecured his poſſeſſion of the crown, yet otherwiſe his title, as in his own right, was not without ſome difficulties: he therefore made a law, not to enact treaſon, but to give ſome ſecurity againſt it, *viz.* 11 *H.* 7. *cap.* 1. "That all perſons, that attend upon the king "and ſoverein lord of this land for the time being in his "perſon, and do him true and faithful ſervice of alligeance "in the ſame, or be in other places by his commandment "in the wars within this land or without, that for the ſaid "deed and true duty of alligeance he or they ſhall be in no "wiſe convict or attaint of high treaſon, nor of other of-"fenſes for that cauſe by act of parliament, or otherwiſe "by any proceſs of law, whereby he or any of them ſhall "now forfeit life, lands, tenements, rents, poſſeſſions, here-"ditaments, goods, chattles, or any other thing, but be for "that ſervice utterly diſcharged of any vexation, trouble, "or loſs; and if any act or acts, or other proceſs of law "hereafter thereupon for the ſame happen to be made con-"trary to this ordinance, that then that act or acts or other "proceſs of law whatſoever they be, ſtand and be utterly "void; provided always, that no perſon or perſons ſhall take "any benefit or advantage by this act, which ſhall hereafter "decline from his or their ſaid alligeance." Upon this act theſe things are obſervable.

1. That this act was not temporary or for the life of king *Henry* VII. but was perpetual, and extended to all ſucceeding kings and queens of this realm, for it is for attendants upon the king or ſoverein lord of this land *for the time being*

2. It is obſervable, that this act extendeth to a king *de facto*, tho not *de jure*, for in truth ſuch was *Henry* VII. for his wife was the right heir to the crown, and his regal power was principally by an act of parliament made 1 *H.* 7. before his intermarriage with his queen, tho both titles were derived to his deſcendents, *viz.* *Henry* VIII. and in default of iſſue, to his ſiſter, from whom our preſent ſoverein is deſcended: and this act, tho extended to his ſucceſſors, which were kings *de jure*, as well as *de facto*, yet was made for the ſecurity of himſelf and his ſervants in the firſt place, which appeareth more fully alſo by the preamble.

3. That tho this act might ſecure the attendants on the king in his wars againſt impeachments in an ordinary courſe of law, and might as to this purpoſe exempt them from the danger of any treaſon by the ſtatute of 25 *E.* 3. as adherers to the king's enemies, yet it was a vain proviſion againſt future acts of parliament, whoſe hands could not be bound by a former act from repealing it, or taking away the effect thereof in part or in all.

It is true, ſince that time this kingdom hath had no great experience of changes of this nature, nor need to make uſe of the advantage of this ſtatute: it is true queen *Mary* began her reign 6 *July* 1553. ſhe was crowned 6 *Octob.* following, her firſt ſeſſion of parliament began 5 *Octob.* 1553. which was the day before her coronation, and the ſecond ſeſſion thereof was held by prorogation 24 *Octob.* 1 *Mar.*

Upon that 6th of *July*, which was the day of king *Edward*'s death, and before queen *Mary* was actually ſettled, the lady *Jane Gray* ſet up a title for herſelf, and continued in ſome kind of regal power, until the 1ſt of *Auguſt* following, and during thoſe twenty-four days the ſtyles of deeds, ſtatutes and other things (and poſſibly alſo proceſſes) were made in her name, and a ſpecial act was made 1 *Mar. ſeſſ.* 2. *cap.* 4. to make them effectual, and to be pleadable in the ſtyle, name, and year of queen *Mary*; ſo that the lady *Jane* ſeemed an intruder for about twenty-four days; but the truth is, ſhe was not ſo much as an uſurper, or a queen *de facto*: and theſe her aſſiſtants in that buſineſs, *viz.* the archbiſhop

of *Canterbury*, the duke of *Northumberland*, the ſaid lady *Jane* and divers others were attainted before commiſſioners of *oyer* and *terminer*; and thoſe attainders confirmed by parliament 1 *Mar. ſeſſ.* 2. *cap.* 16. and note in that act of attainder a ſpecial proviſo, that the poſſeſſions of the archbiſhoprick of *Canterbury* ſhould not be forfeited by that attainder or act of parliament; poſſibly they thought that the general words of that act, or at leaſt the ſtatutes of 26 *H.* 8. and 33 *H.* 8. which gave forfeitures for treaſon againſt ſucceſſors, and were not repeald by 1 *Mar.* might otherwiſe have forfeited the lands of the archbiſhoprick by the attainder of the archbiſhop; but of this *ſupra cap.* 23. *p.* 252.

4. But what was the meaning of the proviſo in that act of 11 *H.* 7. "That no perſons ſhall have the benefit of this act, "who ſhall decline from his alligeance," is dark and dubious.

But theſe queſtions never failed to be ſoon decided on the victor's part by their parliaments, which were always obſequious enough in theſe matters to the victor, and ready to paſs acts of attainders for his ſafety and their own, againſt which no ſecurity was, nor could be given by this act of 11 *H.* 7.

I come now to the reign of *Henry* VIII. which was a reign, wherein acts concerning treaſon were exceedingly multiplied, and they are of three kinds: 1. Such acts, as conſtituted or declared treaſon. 2. Such acts, as concerned the trial of treaſon. 3. Such as concerned the puniſhment or forfeiture of treaſon.

By the ſtatute of 22 *H.* 8. *cap.* 9. *Richard Roſe* for wilful poiſoning of divers perſons is by authority of parliament attainted of high treaſon, and that he be boiled to death: and by authority of parliament murder by wilful poiſoning is made treaſon for the future, and the offender to be boiled to death, and not to have benefit of the clergy: juſtices of peace to have power to inquire of this offenſe, and alſo of counterfeiting coin of any forein kingdom, ſuffered to be current here, the title of lords to eſchete of the lands of offenders in poiſoning is ſaved to them. (*k*)

This

(*k*) *Co. P. C. p.* 48.

This treaſon is repeald by 1 *Mar. cap.* 1. and the ſame remains felony as before.

By 26 *H.* 8. *cap.* 13. "Maliciouſly to wiſh, will, or deſire "by words or writing, or by craft to imagine, invent, practiſe, "or attempt any bodily harm to the king, queen, or their "heirs apparent, to deprive them, or any of them of their "dignity, title, or name, or ſlanderouſly, or maliciouſly to "publiſh by expreſs writing, or words, that the king, our "ſovereign lord is an *heretic, ſchiſmatic, tyrant, infidel* or *uſurper*, or rebelliouſly to detain any of his caſtles, *&c.* in this "realm, or other his dominions, or rebelliouſly to detain or "keep any of his ſhips, ammunition, or artillery, and do not "humbly render the ſaid caſtles, fortreſſes, ſhips, or artillery "to our ſoverein lord, his heirs or ſucceſſors, or ſuch as ſhall "be deputed by them, within ſix days after they be commanded thereunto by proclamation under the great ſeal, is "enacted to be treaſon in the offenders, their aiders, counſellors, conſenters and abetters: forein treaſon to be tried in "any county, where the king ſhall appoint by commiſſion.

1. It ſhould ſeem, that this act was intended to be perpetual, for in it and the ſubſequent clauſe of forfeitures it mentions the king, *his heirs and ſucceſſors.* 2. Part of this ſeems to be treaſon by the ſtatute of 25 *E.* 3. *viz.* the practiſing any bodily harm, if there be an overt-act, and alſo the rebellious detaining of the king's caſtles after ſummons by proclamation; the reſt are purely new treaſons. 3. But whether it was temporary or perpetual, all treaſon reſting ſingly, as enacted by authority of this act, is repeald by 1 *E.* 6. and 1 *Mar.* and yet the latter clauſe (*l*) concerning forfeiture in relation to all treaſons within 25 *E.* 3. ſtands unrepeald; *de quo vide ſupra & infra.*

By 27 *H.* 8. *cap.* 2. counterfeiting privy ſeal, privy ſignet, or ſign manual is made treaſon, and the offenders, their counſellors, aiders, and abetters to ſuffer and forfeit, as in caſe of treaſon; this is repeald by 1 *Mar. cap.* 1. and then re-enacted by 1 *Mar. cap.* 6.

By

(*l*) By this latter clauſe the offender, *&c.* ſhall forfeit to the king, his heirs and ſucceſſors all lands, tenements and hereditaments of any eſtate of inheritance in uſe or poſſeſſion, by any right, title or means.

By 25 *H.* 8. *cap.* 22. the divorce between the king and queen *Katharine* is affirmed by parliament, and alſo the marriage between him and *Anne Bullen*, and the crown with all dignities, honors, preeminences, prerogatives, authorities, and juriſdictions to the ſame annext or belonging, is entaild after the king's death to the heirs of his body lawfully begotten, *viz.* to the firſt, ſecond and other ſons of the king and of the ſaid queen *Anne*, and to the heirs of their bodies ſucceſſively, and for want of ſuch iſſue male, to the heirs male of the king, and the heirs of their ſeveral bodies; and for want of ſuch iſſue, to the lady *Elizabeth*, their daughter and the heirs of her body, and ſo to their ſecond, third and other daughters, and for want of ſuch iſſue, to the king's right heirs.

" If any by writing, printing, or exterior act maliciouſly " do or procure any thing to the peril of the king's perſon, " or to the diſturbance of the king's enjoyment of the crown, " or to the prejudice or derogation of the marriage between " him and queen *Anne*, or to the peril, ſlander, or diſheriſon " of any of the iſſues or heirs made by this act inheritable " to the crown, it ſhall be high treaſon.

" If any by words without writing, *&c.* maliciouſly pub- " liſh any thing to the ſlander of the ſaid marriage between " the king and queen *Anne*, or to the ſlander or diſheriſon of " the iſſues of the king's body begotten on the ſaid queen " *Anne*, or other heirs inheritable to the crown by virtue of " this act, it ſhall be miſpriſion of treaſon:" an oath is appointed to be taken in purſuance hereof, and the refuſers are guilty of miſpriſion of treaſon; proviſion is made for the cuſtody of the heir of the crown during minority.

28 *H.* 8. *cap.* 7. The laſt act is repeald, and all intermediate offenſes againſt that act in relation to queen *Anne* or the lady *Elizabeth* pardoned; queen *Anne* and others attainted of treaſon; the marriage between the king and queen *Catharine* annulled and judged void, and the iſſues between them to be illegitimate; the marriage between the king and queen *Anne* judged void by ſentence of divorce of the archbiſhop; the ſame ſentence confirmed, and the marriage with queen *Anne* judged and declared null and void, and the iſſues between them declared

clared illegitimate and excluded from inheriting the crown: *Levitical* degrees ſettled. Children between the king and queen *Jane* ſhall be adjudged the king's lawful children, and inheritable to the crown; the crown entaild to king *Henry* VIII. and the heirs of his body lawfully begotten, that is to ſay, to the firſt, ſecond and other ſons of the king on the body of queen *Jane* begotten, and the heirs of their bodies ſeverally; and in default of ſuch iſſue male, then to the firſt ſon and heir male of his body, and ſo to the ſecond and other ſons in tail, and for the want thereof, to the firſt and other iſſue female between the king and queen *Jane* in tail, and for want of ſuch iſſue, to the king's firſt and other iſſue female in tail, and for lack of iſſue of the king's body, to ſuch perſon, and in ſuch manner as he ſhall appoint by his laſt will or letters patent; proviſion againſt diſturbances of the heir of his body ſo nominated under pain of treaſon; "And "if any ſhall by words, writing, printing or other exterior "act directly or indirectly do or procure maliciouſly any "thing to the peril of the perſon of the king, his heirs or "ſucceſſors having the royal eſtate of the crown, or mali-"ciouſly or willingly by words, *&c.* give occaſion, whereby "the king, his heirs or ſucceſſors might be interrupted of "the crown, or for the interruption, repeal or adnullation "of this act, or the king's diſpoſal of the crown according "to it, or to the ſlander, diſturbance or derogation of the "marriage between the king and queen *Jane*, or any other "lawful wife, which he ſhall hereafter marry, or to the pe-"ril, ſlander or diſheriſon of any of the iſſues and heirs of "the king limited to be inheritable to the crown, or to whom "the king ſhall by authority of this act diſpoſe it, or that "affirm, *&c.* the marriage between the king and queen *Catharine*, or between the king and queen *Anne* to be good, "or ſlander the ſentences of divorce aboveſaid, or publiſh "their iſſues to be the king's lawful children, or ſhall at-"tempt to deprive the king, the queen, or any made inhe-"ritable to the crown by this act, or to whom the king by "authority of this act ſhall diſpoſe thereof, of their titles, "ſtyles, names, degrees, or royal eſtate or regal power, or

" refuſe to take an oath to anſwer ſuch queſtions, as ſhall " be objected to them upon any clauſe of this act, or after " taking the oath do contemptuouſly refuſe to anſwer ſuch " interrogatories, as ſhall be objected concerning the ſame, " or ſhall refuſe to take the oath injoined by this act, they, " their aiders, counſellers, maintainers and abetters ſhall be " guilty of treaſon, and forfeit all their lands, *&c.* and all " ſanctuary excluded.

The form of the oath is ſet down in the act, and power is given to the king by will to diſpoſe of the cuſtody of the king's iſſue within age.

It is made treaſon to diſturb ſuch diſpoſal, and alſo power is given to the king to diſpoſe or give by will, *&c.* to any of his blood any title, ſtyle, name, honors, tenements or hereditaments.

Nota, This act doubted whether the attempting any thing in parliament againſt the marriage of queen *Anne* might not bring them in danger of the act of 25 *H.* 8. and therefore took care both to repeal the act, and to diſcharge and pardon what had been attempted againſt it.

The clauſe enabling the king to diſpoſe of any honors or lands to thoſe of his blood by will was neceſſary, for without ſuch an enabling act of parliament the king could not diſpoſe thereof by *will*, but only by *letters patents* under the great ſeal, or for lands parcel of the duchy of *Lancaſter* under the ſeal of the duchy.

But it ſeems, that as to the diſpoſal of lands belonging to the crown or duchy by letters patents under theſe reſpective ſeals, the king had power without this act, or the 35 *H.* 8. *cap.* 1. to diſpoſe thereof, and to bind his ſucceſſors.

And this by reaſon of the ſpecial penning of thoſe acts, which, as I think, did not entail *the lands*, that the king had *in jure coronæ* or *in jure ducatûs Lancaſtriæ*, but only limits the ſucceſſion of the crown and of the dignities, honors, prerogatives, preeminences, authorities or juriſdictions to the ſame annext or belonging, which are but ſo many expreſſions of the parts or incidents of the regal dignity, and not of the lands or poſſeſſions of the crown, but thoſe reſted in the crown in fee-ſimple, as they were before thoſe acts made.

And hence it is, that in the ſeveral acts of 34 *H.* 8. *cap.* 21. 1 *E.* 6. *cap.* 8. 18 *Eliz. cap.* 2. 35 *Eliz. cap.* 3. 43 *Eliz. cap.* 1. for confirmation of letters patents, there is no clauſe to make them good, notwithſtanding the entail of the crown, for it was not needful; but the lands granted by king *Henry* VIII. *Edward* VI. queen *Mary*, queen *Elizabeth*, ſtand effectual without any ſuch confirmation, and yet the entail of the crown by theſe acts continued till the death of queen *Elizabeth*, at which time it was ſpent, and king *James* ſucceeded to the crown as the true heir thereof, without the help of any entail or nomination by *Henry* VIII.

And yet after all this the whole ſcheme was altered by the ſtatute of 35 *H.* 8. *cap.* 1. for thereby after recital of the ſtatute of 28 *H.* 8. and that the king had iſſue by queen *Jane* prince *Edward*, and the king had ſince married the lady *Catharine*; It is enacted, " That if the king and prince *Edward* " die without heirs of either of their bodies, the crown ſhall " remain to the lady *Mary* and the heirs of her body under " ſuch conditions, as ſhall be limited by the king by his let- " ters patents, or his laſt will, and for want of ſuch iſſue " or upon breach of ſuch conditions, to the lady *Elizabeth* " and the heirs of her body under ſuch conditions, as ſhall " be limited by the king by his laſt will or letters patents; " and in default of ſuch iſſue, or upon breach of ſuch condi- " tions, to ſuch perſons and for ſuch eſtates, as the king ſhall " limit by his will or letters patents.

This act repeals the former oath of 28 *H.* 8. and directs the form of a new oath to be taken for the extirpation of the pope's pretended ſupremacy, and limits it to be taken by all that ſue livery, have any office of the king's gift, receive orders, take degrees, and by all perſons whom the king, *&c.* ſhall appoint, and that it ſhall be treaſon in ſuch, who obſtinately refuſe to take the oath.

It is alſo enacted, " That if any perſon by words, writing, " printing or exterior act maliciouſly or willingly do or pro- " cure any thing directly or indirectly for the repeal, annul- " lation or interruption of this act, or any thing therein " contained,

" contained, or of any thing that ſhall be done by the king " in the limitation of the crown to be made as aforeſaid, or " to the peril, diſheriſon or ſlander of any of the iſſues and " heirs of the king being limited by this act to inherit and " to be inheritable to the crown, or to the diſheriſon or in- " terruption of any perſon, to whom the crown is by this " act, or ſhall be limited by the king as aforeſaid, whereby " they may be deſtroyed or interrupted in body or title of " the inheritance of the crown, the ſame ſhall be high trea- " ſon in the offenders, their maintainers, aiders, counſellors, " and abetters, ſaving to all perſons, other than the parties " attainted, their heirs and ſucceſſors, all rights, *&c.* in the " lands of the perſons attaint.

And note that notwithſtanding the caution uſed in the act of 28 *H.* 8. for the pardon of the attempting to repeal the act of 25 *H.* 8. no ſuch care was thought neceſſary here for the attempt or procurement to alter the law by act of parliament, for as it could not be reſtrained by a precedent act, ſo neither was it concerned within the penalty.

And thus much for thoſe treaſons, that related to the ſucceſſion of the crown, which I have put together notwithſtanding many of them come after thoſe other acts, which I ſhall hereafter mention.

By the 28 *H.* 8. *cap.* 10. which was the great concluding act againſt the papal authority, the aſſerting or maintaining of the papal authority is brought within the ſtatute of *præmunire*, and he, that obſtinately refuſeth the taking of the oath of abjuration thereby enacted, is ſubjected to the penalty of high treaſon.

By 28 *H.* 8. *cap.* 18. marrying any of the king's children or reputed children or his ſiſters, or aunts of the father's part, or the children of the king's brethren, or ſiſters without the king's licence under his great ſeal, or deflowering of any of them is enacted to be treaſon.

By 31 *H.* 8. *cap.* 8. The king and council's proclamation concerning religion or other matters are to be obeyed under ſuch penalties, as they ſhall think requiſite; they, that diſobey them and then go beyond ſea contemptuouſly to

avoid anſwering ſuch offenſe, ſhall be guilty of treaſon, *&c.* ſaving to every perſon, other than the offenders, their heirs and ſucceſſors, all right, *&c.*

By 32 *H.* 8. *cap.* 25. the marriage between the king and lady *Anne Cleve*, which had been diſſolved by the ſentence of the convocation, was confirmed by parliament with liberty for each party to marry elſewhere: if any by writing, printing, or exterior act, word or deed, accept, take, judge, or believe the ſaid marriage to be good, or attempt any thing for the repeal or adnullation of this act, it ſhall be high treaſon in them, their aiders, counſellers, abetters or maintainers, ſaving the rights of all, other than the offenders their heirs and ſucceſſors; and all perſons that have acted againſt the ſaid marriage are pardoned.

By 33 *H.* 8. *cap.* 21. Queen *Catharine Howard* was attainted of high treaſon, and all perſons that had acted againſt her were pardoned: any woman, whom the king or his ſucceſſors ſhall intend to take to wife, thinking her a pure and clean maid, if ſhe be not ſo, and ſhall willingly couple herſelf in marriage to the king notwithſtanding, without diſcovering it to the king before marriage, ſhall be guilty of high treaſon; and if any other know it and reveal it not, it ſhall be miſpriſion of treaſon: the queen or prince's wife ſolliciting any perſon to have carnal knowledge of her, or any perſon ſolliciting the queen or prince's wife to have carnal knowledge of her is treaſon in them reſpectively, their counſellers, aiders and abetters.

By 35 *H.* 8. *cap.* 3. The king's ſtyle (Henricus *octavus Dei gratiâ* Angliæ, Franciæ & Hiberniæ *rex, fidei defenſor, & in terrâ eccleſiæ* Anglicanæ & Hiberniæ *ſupremum caput*) is united and annexed to the imperial crown of *England*; and if any ſhall imagine to deprive the king, queen, prince, or the heirs of the king's body, or any to whom the crown is or ſhall be limited, of any of their titles, ſtyles, names, degrees, royal eſtate, or regal power annext to the crown of *England*, it ſhall be high treaſon, ſaving the right of all other than the offenders, their heirs and ſucceſſors.

And thus far concerning the ſeveral treaſons enacted in this king's time, all which are nevertheleſs now abrogated and repeald by 1 *E.* 6. and 1 *Mar.* as ſhall be ſhewn.

II. There are ſeveral acts of parliament in this king's time, which concern trials of treaſon, ſome of which are in force at this day, and not repeald by any ſtatute.

By 26 *H.* 8. *cap.* 6. The treaſon concerning counterfeiting, waſhing, clipping and miniſhing of money current within this realm, as likewiſe other felonies committed in *Wales* or the marches thereof, may be heard and determined before juſtices of gaol-delivery in the next *Engliſh* county; but note, this extends not to other treaſons, nor at this day to clipping or miniſhing the coin, for the acts, that made them treaſon at that time, *viz.* 3 *H.* 5. and 4 *H.* 7. ſtand now repeald, and the ſtatutes of 5 *Eliz. cap.* 11. for clipping, and 18 *Eliz. cap.* 1. for miniſhing the coin, direct it to be tried by the courſe and order of the law; and ſo it is alſo for counterfeiting of forein coin by the ſtatute of 1 *Mar.* yea, and as to counterfeiting the coin of this kingdom, or any other offenſe touching coin by the ſtatute of 1 *&* 2 *P. & M. cap.* 11. the indictment and trial is directed to be according to the courſe of the common law; ſo that as to coin alſo the ſtatute of 26 *H.* 8. is now out of doors.

28 *H.* 8. *cap.* 15. For trial of treaſon committed upon the high ſea before the admiral, *&c.* by commiſſion under the great ſeal; this ſtatute as to trial of treaſon upon the ſea ſtands unrepeald by 1 *Mar.* and whether as to treaſons committed in any rivers, or ports, or creeks within the bodies of counties it be not repeald by 1 *&* 2 *P. & M. cap.* 10. or by the ſtatute of 35 *H.* 8. *cap.* 2. for trial of forein treaſons, is conſiderable.

By 32 *H.* 8. *cap.* 4. Treaſons and miſpriſions of treaſon committed in *Wales* or in other places where the king's writ doth not run, ſhall be tried before ſuch commiſſioners of *oyer* and *terminer*, as the king ſhall appoint, as if committed in the ſame counties, into which the commiſſion is directed.

This is repeald by the ſtatute of 1 *&* 2 *P. & M. cap.* 10. cited to be ſo adjudged in *H.* 14 *Eliz.* (*m*) *Co. P. C. p.* 24. be-

cauſe

(*m*) Lord *Lumley's* caſe.

cauſe it is done within the realm, and ſo may be tried in *Wales.*

33 *H.* 8. *cap.* 20. Concerning the proceeding touching the enquiry and trial of treaſon committed by perſons, that become lunatic after the treaſon committed, without putting them to anſwer, and touching the execution of perſons attainted of treaſon, and afterwards becoming lunatic, is repeald by the ſtatute of 1 & 2 *P.* & *M. cap.* 10. *vide Co. P. C. p.* 4 & 6. both as to the indictment and as to the trial; but the forfeiture of perſons attainted of treaſon, as to old treaſons, ſtands in force.

33 *H.* 8. *cap.* 23. Treaſon or miſpriſion of treaſon or murder committed by a perſon examined before three of the council, and found by them guilty, or ſuſpected, may be enquired of, heard and determined before commiſſioners of *oyer* and *terminer* in any county of *England* to be named by the king, by jurors of the county in ſuch commiſſion: challenge for lack of forty ſhillings freehold allowed, peremptory challenge is ouſted in treaſon or miſpriſion of treaſon; trial by peers is ſaved.

This ſtatute as to the indictment and trial of treaſon in any forein county ſtands repeald by 1 & 2 *P.* & *M. cap.* 10. as was ruled by all the judges of *England* in *Somerville*'s caſe, *M.* 26 *Eliz.* reported by juſtice *Clench, n.* 17. (*n*) againſt the opinion of *Stamford, Pl. Cor. Lib.* II. *cap.* 26. both as to the indictment and alſo as to the trial; for *Somerville* was indicted in the county where the offenſe was, and by a commiſſion in *Middleſex* was tried by a jury of the county, where the offenſe was committed; but as to murder it ſeems to ſtand unrepeald and accordingly put in ure; *Crompton*'s juſtice. (*o*)

35 *H.* 8. *cap.* 2. Treaſons, miſpriſions and concealments of treaſons committed out of the realm ſhall be heard and determined by the court of king's bench, and tried by a jury of that county, where the court ſits, or before commiſſioners and in ſuch ſhire, where the king ſhall appoint by his commiſſion, by good and lawful men of the ſame ſhire, as if committed

(*n*) This is reported 1 *And. p.* 104. (*o*) *p.* 22. lord *Grevil*'s caſe.

committed in the ſame ſhire: trial of a nobleman by his peers is ſaved.

Upon this ſtatute theſe points have been reſolved: 1. That this act is not repeald by 1 *E.* 6. or 1 *&* 2 *P. & M. cap.* 10. thus it was reſolved in *Orurk*'s caſe, *Co. P. C. p.* 24. 2. It extends to a treaſon committed in *Ireland*, reſolved in Sir *John Perrot*'s caſe (*p*), *Co. P. C. p.* 11. 3. It extends to a treaſon committed in *Ireland* by a peer of *Ireland*, ſo reſolved in 22 *Car.* 1. in *B. R.* in *Macguire*'s caſe (*q*). 4. The commiſſion in this act mentiond may be ſigned by the king's ſign manual, or the warrant to the chancellor to iſſue the commiſſion may be ſigned by the king's ſign manual, and either of them is warranted by this ſtatute, ſo reſolved *H.* 36 *Eliz.* cited *Co. Pla. Cor. p.* 11. in the caſe of *Patrick Ocullen.* 5. If an indictment be taken by virtue of this ſtatute in the county of *Middleſex*, and then the bench is removed by adjournment into another county, if the priſoner pleads not guilty, it ſhall be tried by a jury of that county, where the indictment is taken, becauſe the words are, *that it ſhall be inquired, heard and determined by good and lawful men of the ſame county, where the ſaid bench ſhall ſit. M.* 35 *&* 36 *Eliz. B. R.* in the caſe of *Francis Dacres* cited *Co. Pl. Cor. p.* 34. but otherwiſe upon an indictment upon the ſtatute of 5 *Eliz. cap.* 1. for refuſing the oath of ſupremacy. *Co. Pl. Cor. ibidem.* (*r*)

III. As touching the *third* point of forfeitures by treaſon I ſhall ſay little more, than what is ſaid before in the preceding chapter concerning the forfeiture of tenant in tail.

Only it ſeems, that the law was taken upon the ſtatutes of 33 and 36 *H.* 8. before mentiond, that if an abbot or a biſhop were attainted of treaſon, that by force of the general words of *forfeiting all their lands, tenements and hereditaments* they forfeit the lands of their church, tho they had them in *autre droit.*

1. Becauſe in the ſavings of theſe ſtatutes, yea and in all the new ſtatutes of treaſon made in the time of *Henry* VIII. abovementiond the ſaving runs, *ſaving to all perſons other than*

the

(*p*) *State Tr. Vol.* I. *p.* 181.
(*q*) *State Tr. Vol.* I. *p.* 928.
(*r*) The caſe of *Edmund Bonner* Biſhop of *London.*

the offenders, their heirs and ſucceſſors ſuch right, &c. and the exception of *ſucceſſors* makes it probable, that they intended, when a ſole corporation was attainted of treaſon, he ſhould forfeit the lands of his church.

2. Becauſe in the act of attainder of the archbiſhop of *Canterbury* 1 *Mar. cap.* 16. there is a ſpecial proviſo, that it ſhould not extend to the lands which he had in right of his archbiſhoprick; but that theſe ſhould be ſaved, as if he had not been attainted.

3. Becauſe by the act of 31 *H.* 8. *cap.* 13. it appears plainly, that the poſſeſſions of monaſteries, where the abbots were attainted of treaſon, came thereby to the crown, tho they are not annexed to the court of augmentations of the king's revenues.

4. It is clearly admitted by the judges in the caſe of the biſhop of *Durham*, *Dy.* 289. that by force of the ſtatute of 26 *H.* 8. the lands of abbeys, *&c.* came to the crown by the attainder of treaſon of the abbots, *&c.* and poſſibly it was in deſign at the time of the making of that ſtatute.

But it is true, that before that ſtatute of 26 *H.* 8. 1. The lands, which a perſon had in right of his church, were not forfeited by attainder of treaſon. 2. That altho the lands of a ſole corporation, ſuch as were an abbot, prior, biſhop, might be forfeited by attainder by the ſpecial penning of 26 and 33 *H.* 8. yet the lands of an aggregate corporation, as dean and chapter, mayor and commonalty, were not forfeited by the treaſon of the dean, or mayor, by virtue of thoſe ſtatutes, for the right of the land was in the commonalty and chapter, as well as in the dean or mayor, and not in them alone. 3. That at this day the attainder of treaſon doth not forfeit the lands of a biſhop, parſon or other ſole eccleſiaſtical corporation: 1. Becauſe the ſtatutes of 1 *Eliz.* (*ſ*), and 13 *Eliz. cap.* 10. (*t*), diſabling biſhops, maſters of hoſpitals, *&c.* to alien their poſſeſſions, diſable them to forfeit as well as alien, or otherwiſe the ſtatute would be illuſory. 2. By the ſpecial penning of the ſtatutes of 1 *E.* 6. *cap.* 12. and 1 *Mar.* whereby

(*ſ*) This is not among the printed ſtatutes.

(*t*) This ſtatute made perpetual by 3 *Car.* 1. *cap.* 4.

it is enacted, that no penalties ſhall be inflicted for treaſon, other than ſuch as be by 25 *E.* 3.

Concerning the forfeiture of lands in a county palatine by the attainder of treaſon out of a county palatine, or *e converſo.*

By the ſtatutes of 9 *H.* 5. *cap.* 2. 18 *H.* 6. *cap.* 13. 20 *H.* 6. *cap.* 2. 31 *H.* 6. *cap.* 6. outlawries of treaſon, *&c.* in the county palatine of *Lancaſter* were not to cauſe a diſability of the perſon outlawed, nor induce any forfeiture of the lands or goods of the party outlawed lying out of that county; but by the ſtatute of 33 *H.* 6. *cap.* 2. theſe acts are repeald, and it is ordained, that the indicters in a county palatine (where the indictment ſuppoſes any perſon to be inhabiting out of the county of *Lancaſter* within ſome other county of the realm) have lands to the yearly value of five pounds in that county, and that upon indictment to be taken out of the county palatine of perſons reſiding there, the indicters ſhall have a yearly freehold of five pounds, and that no proceſs be made out upon any ſuch indictments, till it has been examined by the king's juſtices, whether the indicters be ſo qualified.

But now by the ſtatute of 27 *H.* 8. *cap.* 24. all powers in county palatines for making of juſtices in eyre, of aſſiſe, of peace, of gaol-delivery, are reſumed, and ſuch commiſſions are to paſs under the great ſeal of *England*, only in *Lancaſter* they are to be under the uſual ſeal of *Lancaſter*: all proceſſes to be in the king's name under the *teſte* of him, that hath the county palatine; all indictments, *&c.* are to conclude *contra pacem regis*, and all fines and amerciaments upon officers are reſumed; ſo that now all proceſs of outlawry, attainder, *&c.* in county palatines are of the ſame effect and induce the ſame forfeitures, as if the offenſes were committed, tried and determined in any other county of *England.*

But this alters not the title of the biſhop of *Durham* or any other, that had royal forfeitures of treaſons of lands within their liberty, or county palatine, for that is a diſtinct franchiſe, and not at all touched by the act of reſumption, as appears by the caſe in *Dyer* (*u*) before cited, and by what is ſaid

2 in

(*u*) *Dyer* 289.

in the precedent chapter touching forfeitures by treaſon: and thus far for acts touching treaſon in the time of *Henry* VIII.

As touching treaſons in the verge I ſhall particularly mention the ſame hereafter.

I come now to the time of king *Edward* VI.

1 *E.* 6. *cap.* 12. There are theſe ſeveral changes made by theſe ſeveral clauſes.

1. It is enacted, that no act, deed or offenſe being by ſtatute made treaſon or petit treaſon by words, writing, cyphering, deeds or otherwiſe whatſoever, ſhall be deemed or adjudged high treaſon or petit treaſon, but only ſuch as be treaſons or petit treaſons in or by the ſtatute of 25 *E.* 3. for declaring treaſon, and ſuch offenſes, as hereafter by this act are expreſſed and declared to be treaſon or petit treaſon; and no other penalties to be inflicted upon the offenders in treaſon or petit treaſon, but what are ordained by that, or this ſtatute.

2d clauſe repeals the ſtatutes concerning heretics, *Lollards*, the ſix articles, ſelling of books of the ſcriptures, *&c.* ordained in the time of *R.* 2. *H.* 5. and *H.* 8.

3d clauſe repeals all felonies made by act of parliament, ſince 23 *April* 1 *H.* 8. that were not felonies before, and all penalties touching the ſame.

4th clauſe repeals the act of 31 *H.* 8. touching obedience to the king's proclamations, and the ſtatute of 34 *H.* 8. impoſing penalties upon the diſobedient.

5th clauſe enacts certain new offenſes, *viz.* "If any ſhall "by preaching, expreſs words or ſayings affirm and ſet forth, "that the king, his heirs or ſucceſſors, kings of this realm, "is not or ought not to be ſupreme head on earth of the "church of *England* and *Ireland* immediately under God, or "that the biſhop of *Rome*, or any beſides the king for the "time being, ought by the laws of God to be ſupreme head "of the ſame churches, or that the king, his heirs or ſucceſſors, kings of this realm, ought not to be king of *England*, *France* and *Ireland*, or any of them, or do compaſs "by open preaching, expreſs words or ſayings to depoſe or "deprive the king, his heirs or ſucceſſors kings of this realm, "from his royal eſtate or titles to the ſame kingdoms, or

"do

" do openly publiſh, or ſay by expreſs words or ſayings, that " any perſon, other than the king, his heirs or ſucceſſors " kings of this realm, of right ought to be king of the realms " aforeſaid, or any of them, or to have or enjoy the ſame or " any of them, the offenders, their counſellers, aiders, abettors, " procurers and comforters, for the firſt offenſe ſhall loſe his " goods, and ſuffer impriſonment during the king's pleaſure; " and if after ſuch conviction he ſhall commit the ſame of- " fenſe again, other than ſuch as be expreſſed in the ſtatute " of 25 *E.* 3. he ſhall forfeit to the king the profits of his " lands, benefices, and eccleſiaſtical promotions during his " life, and all his goods, and ſuffer perpetual impriſonment; " and for the third offenſe after a ſecond conviction, he ſhall " be guilty of treaſon, and ſuffer and forfeit as a traitor.

6th clauſe enacts that, " If any perſon ſhall by writing, " printing, overt-act or deed, affirm or ſet forth, that the " king of this realm for the time being, is not or ought not " to be ſupreme head on earth of the churches of *England* " and *Ireland*, or any of them immediately under God, or " that the biſhop of *Rome* or any perſon, other than the " king of *England* for the time being, is or ought to be ſu- " preme head on earth of the ſame churches or any of them, " or do compaſs or imagine by writing, printing, overt-deed " or act to depoſe or deprive the king, his heirs or ſucceſſors " from their royal eſtate or titles of king of *England*, *France* " and *Ireland*, or any of them, or by writing, printing, " overt-act or deed, do affirm, that any perſon, other than " the king, his heirs and ſucceſſors, of right ought to be " king of the realms of *England*, *France* and *Ireland*, or any " of them, then every ſuch offender ſhall be guilty of treaſon, " and ſuffer and forfeit, as in caſe of high treaſon.

7th clauſe enacts, " That this act ſhall not extend to re- " peal any ſtatutes touching the counterfeiting, clipping, fi- " ling or waſhing the coin current of this kingdom, or im- " porting counterfeit coin, or counterfeiting the king's ſign " manual, privy ſeal, or privy ſignet, their abettors, *&c.*

8th clauſe enacts, " That if the perſons declared by the " act of 35 *H.* 8. to be inheritable to the crown do uſurp " one

" one upon the other, or interrupt the king's poſſeſſion of " the crown, they, their abettors, *&c.* ſhall be traitors.

9th clauſe takes away clergy from perſons found guilty by verdict, confeſſion, or not directly anſwering, or ſtanding mute in caſes of murder of malice prepenſe, of wilful poiſoning, houſe-breaking, any perſon being in the houſe and put in fear, robbing in or near the highway, horſe-ſtealing, ſacrilege; but in all other caſes of felony clergy allowed, and ſanctuary the ſame as before the 24 *April* 1 *H.* 8.

10th clauſe provides, that all the ſtatutes of *H.* 8. concerning challenge, or concerning trial of forein pleas, ſhall ſtand in force.

11th clauſe declares, that no perſon already arreſted or impriſoned, indicted or convicted, or outlawed for treaſon, petty treaſon or miſpriſion of treaſon, ſhall have any advantage of this act.

12th clauſe provides, that wilful killing by poiſon ſhall be deemed wilful murder, and the offenders, their aiders, abettors, counſellers or procurers ſhall ſuffer, as murderers.

13th clauſe enacts, that a lord of parliament in all caſes within the benefit of clergy, tho he cannot read, yet ſhall be deliverd as a clerk convict without burning in the hand, or loſs of lands, *&c.*

14th clauſe ſaves the trial by peers for any offenſes within this ſtatute.

15th clauſe enacts, that clergy be allowed, notwithſtanding the offender have been married to a ſingle woman or widow, or to two wives or more.

16th clauſe enacts, that notwithſtanding attainder of treaſon, petit treaſon, miſpriſion of treaſon, murder or felony, the wife ſhall have her dower, and ſaves to all and every perſon, other than to the offender attainted, convict or outlawed, all ſuch right, title, intereſt, entry, leaſes, poſſeſſion, condition, profit, commodity, and hereditaments, as they had before or at the time of the attainder, conviction, or outlawry.

17th clauſe provides, that the ſtatute of 27 *H.* 8. for felony in ſervants ſtealing the goods of their maſters, ſhall ſtand in force.

18th clauſe provides, that no perſon be put to anſwer for any of the offenſes aboveſaid concerning treaſon by preaching or words only, unleſs accuſed before one of the king's council, juſtice of aſſiſe or peace, *&c.* within thirty days after the offenſe committed.

19th clauſe, concealing and keeping ſecret any high treaſon ſhall be miſpriſion of treaſon, and the offender ſhall forfeit as heretofore hath been uſed in caſe of miſpriſion of treaſon.

20th clauſe, calling, writing or printing the *French* king king of *France* ſhall not be adjudged any offenſe within this act.

21ſt clauſe provides, that no perſon ſhall be indicted, arraigned, condemned or convicted for any offenſe of treaſon, petit treaſon, miſpriſion of treaſon, or for any words before mentiond, whereby he ſhall ſuffer pains of death, loſs of goods, impriſonment, *&c.* unleſs the offender be accuſed by two ſufficient and lawful witneſſes, or ſhall willingly without violence confeſs the ſame.

I have mentiond the clauſes of this ſtatute at large, and by their numbers, becauſe there be many things obſervable thereupon.

By the firſt clauſe of this ſtatute all thoſe numerous treaſons and petit treaſons, that were enacted or declared at any time ſince 25 *E.* 3. are wholly taken away, except that of counterfeiting, clipping, waſhing, or filing of coin, *&c.* excepted in the 7th clauſe; but this doth not mention miſpriſions of treaſon, but only declares what miſpriſion of treaſon is, for by taking away the treaſons themſelves, the miſpriſions of thoſe treaſons muſt needs ceaſe, as a crime.

But this act did not extend to alter the trials in caſe of treaſon, and therefore notwithſtanding this act the ſtatute of 28 *H.* 8. *cap.* 15. for treaſons at ſea, 26 *H.* 8. *cap.* 6. for counterfeiting, *&c.* in *Wales*, 32 *H.* 8. *cap.* 4. for treaſons in *Wales*, 33 *H.* 8. *cap.* 23. for treaſons to be tried out of their county, 35 *H.* 8. *cap.* 2. for trial of forein treaſons, ſtood yet in their force, until the ſtatute of 1 *&* 2 *P. & M. cap.* 10.

Again, notwithſtanding that by ſome former ſtatutes certain offenſes, which were felony before, as wilful burning of

houſes and poiſoning, were made treaſon, yet the repeal of thoſe acts that made them treaſon leaves them nevertheleſs in the ſtate, wherein they before were, namely felony.

Again, upon conſideration and compariſon of the 5th and 6th clauſes theſe things are obſervable, namely, 1. The wiſdom of the law-makers, that put the very ſame offenſes in words ſpoken in a lower rank of puniſhment than the ſame things written or printed, making the former but a miſdemeanor in the firſt offenſe, which in printing or writing was treaſon in the firſt offenſe. 2. It is obſervable upon that fifth clauſe, that there were ſome things within the fifth clauſe, that might be treaſon or an overt-act of treaſon within the ſtatute of 25 *E.* 3. (*other than ſuch* as be expreſſed in the ſtatute of 25 *E.* 3.) *vide quæ ſupra dicta ſunt cap.* 13. touching the treaſon in compaſſing the king's death.

It is alſo obſervable upon the 11th clauſe, that when an offenſe is made treaſon or felony by an act of parliament, and then thoſe acts are repeald, the offenſes committed before ſuch repeal and the proceedings thereupon are diſcharged by ſuch repeal, and cannot be proceeded upon after ſuch repeal, unleſs a ſpecial clauſe in the act of repeal be made enabling ſuch proceeding after the repeal for offenſes committed before the repeal, as there is in this caſe.

3 & 4 *Ed.* 6. *cap.* 5. Tho it primarily concerns riots, yet conſequently it concerns treaſon alſo: thereby it is enacted,

1. "That if any perſons to the number of twelve or more "aſſembled together ſhall intend, go about, practiſe or put "in ure with force of arms unlawfully, and of their own "authority to kill, take or impriſon any of the king's privy "council, or unlawfully to alter or change any laws eſta"bliſhed by parliament for religion, or any other laws or "ſtatutes of this realm, and being commanded by the ſhe"riff, juſtice of peace, mayor, *&c.* by proclamation in the "king's name to repair to their houſes, if they ſhall conti"nue together by the ſpace of one whole hour after ſuch "proclamation, or after that ſhall willingly in forcible and "riotous manner attempt to do or put in ure any of the "things aforeſaid; this ſhall be adjudged treaſon in all the of"fenders,

" fenders, their aiders, abettors and procurers." See before in chapter XIV. concerning levying of war, how much of this high treaſon is within the ſtatute of 25 E. 3.

2. " That if any perſons to the number of twelve or " more ſhall intend, go about, practiſe or put in ure in man- " ner aforeſaid to overthrow, cut, break or dig up pales, hedges, " ditches or other incloſure of any park, incloſed grounds; " banks of pools or fiſh-ponds, conduits; conduit-heads or " pipes to the ſame, which may remain open, or unlawfully " to have common or way in the ſaid park or grounds, or " to deſtroy the deer, warrens of conies, dove-houſes, fiſh, " or to pull down houſes, mills, bays or barns, or to burn " ſtacks of corn or grain, or to diminiſh the rents or yearly " values of any manors, lands, *&c.* or the price of any vic- " tuals, corn or grain, or any other thing uſual for the ſuſte- " nance of man, and being required, as before, ſhall not " depart, but continue an whole hour, or ſhall after that " forcibly attempt to do or put in ure the things aforeſaid, " they ſhall be adjudged felons without benefit of clergy.

Vide ſupra cap. 14. which of theſe offenſes were a levying of war againſt the king.

3. " That if any perſon unlawfully and without autho- " rity by ringing of bells, ſounding of drums, trumpet, " horn, or other inſtrument, by firing of beacons, by mali- " cious uttering of words, caſting of bills or writings, or by " any act whatſoever raiſe or cauſe to be aſſembled any per- " ſons to the number of twelve, or above, to the intent that " they ſhall do any of the acts aforeſaid, who ſhall not diſ- " ſolve their aſſembly upon ſuch proclamation within an " hour, or ſhall commit any of the ſaid acts, then they, that " raiſe ſuch aſſemblies, ſhall ſuffer as felons.

4. If ſuch aſſemblies to the number of forty, and above, ſhall continue together two hours, or ſhall bring weapons, meat, *&c.* to the perſons ſo aſſembled, it ſhall be high treaſon.

5. If above the number of two and under twelve attempt ſuch things, *&c.* as aboveſaid, they are to ſuffer impriſon- ment for a year, and make fine and ranſom, with treble da- mages to perſons damnified.

6. In

6. In the caſes of treaſon within this act tenant in tail is to forfeit to the king during life only, and tenant in fee-ſimple to forfeit only as upon attainder of felony.

7. Power is given to the ſheriffs, juſtices, mayor, *&c.* to raiſe power, and array them in manner of war againſt the rioters, to the intent to apprehend the rioters; and if the ſaid rioters do not depart upon proclamation but continue together, it ſhall be lawful for the ſheriff, *&c.* after ſuch commands to kill the rioters; if after ſuch commandment it fortune any of the rioters be killed upon ſuch account, the ſheriff, *&c.* or any aſſembled by him ſhall thereof be diſcharged: then follows the puniſhment of thoſe, who refuſe to aſſiſt the ſheriff, or juſtice in the repreſſion of riots.

Movers to ſuch riots are guilty of felony without clergy, and perſons ſollicited thereunto not revealing it to ſuffer three months impriſonment.

This act being made in a great meaſure for the ſupport of the reformed religion under *Edward* VI. was as to all points of treaſon therein contained repeald by 1 *Mar. cap.* 1. but in effect the very ſame offenſes were enacted felonies within clergy by 1 *Mar. ſeſſ.* 2. *cap.* 12. which was to continue to the end of the next parliament, and after the death of queen *Mary* was re-enacted by 1 *Eliz. cap.* 16. to continue during her life, and till the end of the next ſeſſion after her death, but then expired.

That which I would obſerve upon this act is this, how careful they were in this time not to be over-haſty in introducing conſtructive treaſons, and to ſhew how the opinions of the parliaments of *Edward* VI. queen *Mary*, queen *Elizabeth* went, as to the point of conſtructive treaſon, and how careful they were not to go far in extending the ſtatute of 25 *E.* 3. beyond the letter thereof.

As to the point of indemnifying thoſe, that killed the rioters in aſſiſtance of the ſheriff, it is true, that the killing of rioters barely for continuing together after proclamation required a new law to indemnify it, as in the ſtatute is provided; but if rioters reſiſt the ſheriff in his endeavour to apprehend them, or make head againſt him, or continue to put

in ure their riotous acting, as pulling down houſes, incloſures, *&c.* if the ſheriff, or thoſe that come in aid of him, kill any of them, the law and the ſtatute of 2 *H.* 5. *cap.* 8. do indemnify them, as ſhall be hereafter more fully declared.

By 5 *&* 6 *E.* 6. *cap.* 11. "If any perſon by open preaching, expreſs words or ſayings do expreſly, directly and adviſedly ſet forth and affirm, that the king, that now is, is an heretic, ſchiſmatic, tyrant, infidel, or uſurper of the crown, or that any his heirs or ſucceſſors, to whom the crown is to come by the ſtatute of 35 *H.* 8. being in lawful poſſeſſion of the crown, is an heretic, ſchiſmatic, tyrant, infidel, or uſurper of the crown, then ſuch perſon, his aiders, abettors, procurers, counſellors, and comforters knowing the ſame, ſhall for the firſt offenſe loſe their goods and be impriſoned at the king's will, for the ſecond offenſe after conviction for the firſt loſe the profits of their lands and eccleſiaſtical benefices during their lives, and be perpetually impriſoned, and for the third offenſe after the ſecond conviction be adjudged traitors, and loſe their lives, and forfeit as in caſe of high treaſon.

"If any perſon ſhall by writing, printing, painting, carving or graving, directly, expreſly and adviſedly publiſh, ſet forth and affirm, that the king, or any his heirs or ſucceſſors, *&c.* is an heritic, ſchiſmatic, tyrant, infidel, or uſurper, it ſhall be high treaſon, and he ſhall forfeit as in caſe of high treaſon.

"If any perſon or perſons rebelliouſly detain the king's caſtles, or fortreſſes, ſhips, ordinance, artillery, or fortifications, and do not render them up to the king, his heirs or ſucceſſors within ſix days after proclamation under the great ſeal, it ſhall be treaſon, and the offender, his aiders, *&c.* knowing of the ſaid offenſes ſhall ſuffer and forfeit as in caſe of high treaſon.

"If any the king's ſubjects commit treaſon contrary to this act or any other act in force out of the realm, it ſhall be inquired and preſented by twelve men of any county, which the king by commiſſion ſhall aſſign, as if committed within the realm, and the like proceſs thereupon, as if done within

" the realm, and the outlawry againſt an offender inhabiting
" out of the realm ſhall be as effectual as if he had been re-
" ſident within the realm.

" But if he render himſelf upon the outlawry within a
" year, he ſhall be received to traverſe the indictment. (*x*)

" Perſons attainted of any treaſon ſhall forfeit to the king
" all their lands of any eſtate of inheritance in their own right
" at the time of the treaſon committed, or at any time after.

" No proceeding ſhall be on any the offenſes aforeſaid
" committed only by preaching or words, unleſs the offender
" be accuſed thereof within three months before one of the
" king's council, juſtice of aſſiſe, juſtice of peace being of the
" *quorum*, or two juſtices of peace in the ſhire, where the
" offenſe is committed: concealment of any high treaſon
" ſhall be adjudged only miſpriſion of treaſon, and the offen-
" der to forfeit as in miſpriſion of treaſon.

" Provided that no perſon ſhall be indicted, arraigned,
" condemned, convicted or attainted for any of the treaſons
" or offenſes aforeſaid, or for any other treaſons, that now
" be, or hereafter ſhall be, which ſhall be hereafter perpe-
" trated, committed, or done, unleſs the ſame offender or
" offenders be thereof accuſed by two lawful accuſers, which
" ſaid accuſers at the time of the arraignment of the party
" accuſed, if they be living, ſhall be brought in perſon be-
" fore the party ſo accuſed, and avow and maintain that,
" which they have to ſay againſt the ſaid party to prove him
" guilty of the treaſons or offenſes contained in the bill of
" indictment laid againſt the party arraigned, unleſs the party
" arraigned ſhall willingly without violence confeſs the ſame:
" a ſaving of the right of all, other than the offenders and
" their heirs, or ſuch as claim to their or any of their uſe:
" the wife of the party attainted of theſe or any other trea-

" ſons

(*x*) This clauſe remains, as our author obſerves below, unrepeald to this day, ſo that it was great injuſtice to deny the benefit of a trial within the year to Sir *Thomas Armſtrong*, who was outlawed, while he was beyond ſea, 36 *Car.* 2. and of this opinion was the houſe of commons by their vote *Nov.* 19. 1689. when it was reſolved, that Sir *Thomas Armſtrong*'s plea ought to have been admitted according to the ſtatute of 5 & 6 *E.* 6. ſee *State Tr. Vol.* III. *p.* 896. and accordingly the like plea was allowed to *Johnſon*, who was indicted for counterfeiting the coin, *Mich.* 2 *Geo* 2. *B. R.* altho he had broke priſon, and was retaken in *England*.

" ſons ſhall be barred of dower of the lands of the party " attainted, ſo long as the attainder ſtand in force.

Upon this ſtatute many things are obſervable, 1. That it ſhould ſeem, that neither the writing of theſe ſcandalous words, nor the bare detaining of the king's forts or ſhips were treaſon within the ſtatute of 25 *E.* 3. for if they had been ſuch, this act would not have been made. 2. The *ſecond* thing obſervable is the great diſcrimination, which in this act is made between words and writing, the latter being made treaſon, the former only miſdemeanor in the two firſt offenſes, altho the words be the ſame in both. 3. That ſo much of this act, as is introductive of new treaſon, is repeald by the ſtatute of 1 *Mar. cap.* 1. but whether thoſe two penalties previous to treaſon in caſe of words, *viz.* for the firſt and ſecond offenſe, be repeald by any ſtatute, ſeems doubtful, for thoſe are not treaſon. 4. But thoſe clauſes in this ſtatute, that concern trial of forein treaſons, concerning outlawry of perſons beyond the ſea, forfeiture of lands of inheritance of the party attainted, loſs of dower by the wife of the party attainted, ſtand unrepeald to this day; and ſo it is held by many, that the clauſe concerning two accuſers ſtands ſtill on foot; *de quo vide poſtea.*

Touching the clauſe for the forfeiture of the lands of the party attainted there are theſe things conſiderable.

1. That by this clauſe tenant in tail of the gift of the king doth by his attainder forfeit his eſtate-tail, notwithſtanding the ſtatute of 34 *H.* 8. *cap.* 20. for as that ſtatute coming after 26 & 33 *H.* 8. did as to that caſe repeal ſo much of thoſe acts; ſo this ſtatute of 5 & 6 *E.* 6. coming after 34 *H.* 8. doth repeal that ſtatute, as to the caſe of attainder of treaſon of ſuch donee in tail.

2. That this act varies much from the penning of the acts of 26 and 33 *H.* 8. for they ſeemed, as hath been obſerved, to faſten upon lands in right of a corporation ſole, as biſhop, abbot, *&c.* but this limits it only to lands in their own right, which poſſibly, tho an affirmative clauſe, may correct the extent of the ſtatutes of 26 and 33 *H.* 8. and bind up the forfeiture to lands only in their own right.

As to the point concerning the two lawful accuſers theſe things will be conſiderable, 1. Whether it extend in law to new treaſons made after this act. 2. Whether by any ſtatute this be repeald. 3. Admitting it be not, what ſhall be ſaid two lawful accuſers. 4. What a confeſſion.

I. The ſtatute of 5 *&* 6 *E.* 6. above-mentiond appoints two lawful accuſers in caſe of all treaſon enacted or to be enacted; therefore if a new treaſon were made by a ſubſequent act of parliament without any clauſe, that directs the indictment or trial in any other manner than is appointed by 5 *&* 6 *E.* 6. by the words of this act there muſt be two lawful accuſers, both upon the trial and indictment.

But there have been great opinions, that tho the words of 5 *&* 6 *E.* 6. extend to treaſons, that ſhall be hereafter enacted, yet this clauſe doth not extend in law to ſuch new treaſons, unleſs ſpecial proviſion be made for the ſame in the act making ſuch new treaſon: others have been of a contrary opinion, becauſe it only concerns the manner of proceeding, which may be directed by a precedent act, as upon the ſtatute of 18 *Eliz. cap.* 5. 21 *Jac. cap.* 4.

II. But certainly, if there be by a ſubſequent ſtatute any derogatory clauſe from this ſtatute, then there need not be two lawful accuſers.

Therefore upon the ſtatute of 1 *&* 2 *P.* *&* *M. cap.* 11. in treaſon for counterfeiting the coin current here, or for clipping and impairing of coin (which was then conceived a treaſon not repeald by 1 *Mar. cap.* 1.) the evidence and courſe of proceeding at common law both upon the indictment and trial are reſtored, and ſo no neceſſity of two witneſſes; this is agreed on all hands. *Co. Pl. Cor. p.* 25.

Again, tho the treaſon for clipping or waſhing of coin declared by 3 *H.* 5. *cap.* 6. were repeald by the ſtatute of 1 *Mar. cap.* 1. as is declared by the preamble of the ſtatutes of 5 *Eliz. cap.* 11. and 18 *Eliz. cap.* 1. and that the ſame is newly made treaſon by the ſtatutes of 5 and 18 *Eliz.* and conſequently, were there no more in the caſe, two witneſſes might be requiſite by the words of the act of 5 *&* 6 *Ed.* 6. becauſe thoſe are newly made treaſons, yet by the penning of thoſe ſta-

tutes of 5 and 18 *Eliz.* it is not neceſſary, becauſe the words in both ſtatutes are *being lawfully convicted or attainted according to the order and courſe of the law*, which takes in the whole proceeding, as well indictment as trial; for the courſe of law therein mentiond ſeems to be intended the common law, and at common law there was no neceſſity of two witneſſes in any caſe of treaſon.

And altho the ſtatute of 1 & 2 *P. & M. cap.* 11. did take clipping and waſhing to be continuing treaſons, and therein might miſtake, yet there being an expreſs clauſe in that ſtatute, that in thoſe caſes the evidences at common law ſhould be reſtored; this direction might take off the ſtatutes of 1 and 5 *E.* 6. as to the two witneſſes in thoſe caſes, and ſo have an influence upon the ſtatutes of 5 and 18 *Eliz.* or at leaſt may go far in expounding them to reſtore the evidence required at common law in thoſe caſes.

But whether as to all other treaſons the general clauſe in the ſtatute of 1 & 2 *P. & M. cap* 10. *that all trials hereafter to be awarded or made for any treaſon ſhall be had and uſed only according to the due order and courſe of the common laws of this realm and not otherwiſe*, have taken away the neceſſity of two witneſſes upon the indictment, hath been controverted (*y*), for on all hands it is agreed, that it takes away the neceſſity of two witneſſes upon the trial, if there were no more in the caſe.

My lord *Coke* in *Pla. Cor. p.* 25, 26. delivers his opinion, that two witneſſes are neceſſary upon the indictment in caſe of all treaſons, other than thoſe, that are for counterfeiting, clipping, or impairing the coin, and gives many weighty reaſons for it, and cites a reſolution in 14 *Eliz.* lord *Lumley*'s caſe, and 4 *Mar. Bro. Corone*, 219. for according to him the indictment is a diſtinct thing from the trial; therefore the ſtatute of 1 & 2 *P. & M. cap.* 10. extending only to the trial doth not take away the neceſſity of two witneſſes upon the indictment, and accordingly the general opinion hath run thus ſince. (*z*)

But

(*y*) See *Kel.* 9, 18, 49.

(*z*) *State Tr. Vol.* III. *p.* 56. the caſe of lord *Caſtlemain*, *Ibid. p.* 415. earl of *Shaftsbury*'s caſe; *p.* 645. lord *Ruſſel*'s caſe; *p.* 733. colonel *Sidney*'s caſe.

But yet much is to be alleged, that the ſtatute of 1 & 2 *P. & M. cap.* 10. extends as well to reduce the indictment, as the trial, to the courſe of the common law.

1. Becauſe it ſeems to be the intent of the ſtatute to involve the indictment under the general appellation of the trial, according to 2 & 3 *P. & M. Dy.* 132. *a.* and tho it is true, that *P.* 1 *Mar. Dy.* 99, 100. in *Thomas*'s caſe there were two accuſers required, yet that was before the ſtatute of 1 & 2 *P. & M. cap.* 10.

2. Becauſe this ſtatute of 1 & 2 *P. & M. cap.* 10. in other caſes extends as well to the indictment, as the trial; it is agreed, that the ſtatute of 33 *H.* 8. *cap.* 23. concerning trial of treaſon in a forein county, is wholly repeald by 1 & 2 *P. & M. cap.* 10. *quod vide Co. P. C. p.* 27. *Dy.* 132. whereas, if it ſhould only refer to the trial, the indictment might ſtill be in a forein county, and ſo he might be indicted in a forein county, and yet muſt be tried in the proper county: *vide* accordingly reſolved *H.* 12 *Eliz. Dy.* 286. *b.* touching the rebels in the *North*, where *Stamford*'s opinion, *Lib.* II. *cap.* 26. (*a*) is denied by all the judges of both benches; again, the ſtatute of 33 *H.* 8. *cap.* 20. touching the indictment and trial of lunatics in any county the king ſhall appoint, is repeald by this act of 1 & 2 *P. & M. cap.* 10. as well to the indictment as the trial: *vide Anderſ. Rep. n.* 154. *Arden*'s caſe. (*b*)

3. The indictment is in common ſpeech a part of the trial, or at leaſt a neceſſary incident to it; and if it ſhould be neceſſary to have two witneſſes to the indictment, it would conſequently be neceſſary to have them upon the trial alſo; for by the ſtatute of 5 & 6 *E.* 6. *cap.* 11. the two witneſſes, that are upon the indictment, muſt avow their teſtimony in the preſence of the party upon his arraignment: and it ſeems incongruous, that a greater evidence ſhould be required to the indictment, which is only an accuſation, than to the trial (*c*), where the party is to be convicted; therefore, if the ſtatute of 1 & 2 *P. & M.* intended to take it away upon the trial, it cannot

(*a*) *S. P. C. p.* 90.
(*b*) 1 *And.* 105.
(*c*) Lord *Coke P. C. p.* 25. ſays the greateſt proof is moſt of all neceſſary at the time of the indictment, becauſe that is the foundation of all the reſt, and is commonly found in the abſence of the party accuſed.

cannot be ſuppoſed to continue the neceſſity of two witneſſes upon the indictment.

4. There is alſo a great authority for this opinion: *vide* the reſolution and reaſon of the judges in *Arden's* caſe, *Anderſ. Rep. n.* 154. (*d*), where they reſolved, that they could not be indicted in a forein county upon the ſtatute of 33 *H.* 8. *cap.* 23. becauſe the ſtatute of 1 & 2 *P. & M. cap.* 10. reſtoreth the common law as well in relation to the indictment as the trial, and the trial includes the indictment; and this was by all the juſtices and barons ſo reſolved, which caſe is alſo reported by juſtice *Clench*, *n.* 17. to be 19 *Novem.* 26 *Eliz.* Again *ibidem n.* 28. "Fuit tenus per les juſtices, que ou le ſta-
" tute de *E.* 6. eſt, que inditement de treſon ſera per 2 teſtes,
" & le ſtatute de reine *Mary* eſt, que treſons ſey try ſolonc
" le common ley, que ore inditements ſey ſolonc le common
" ley, car inditement eſt parcel de tryal, car nul tryal poet
" eſtre ſans inditement, & ſic fuit in *Somerville's* & *Arden's*
" caſe.

5. It hath been the care of the parliaments ſince in their acts to make proviſion for two witneſſes in caſes of treaſons newly made, *vide* ſtatutes 13 *Eliz. cap.* 1. 13 *Car.* 2. *cap.* 1. ſo that it was thought, that the ſtatute of 5 & 6 *E.* 6. was not of force as to the two witneſſes, at leaſt as to treaſons newly enacted, otherwiſe in caſes of new treaſons they needed not theſe proviſions. (*e*)

And thus the reaſons ſtand on both ſides, and tho theſe ſeem to be ſtronger, than the former, yet in a caſe of this moment it is ſafeſt to hold that in practice, which hath leaſt doubt and danger; *quod dubitas, ne feceris*, eſpecially in caſes of life (*f*); but upon miſpriſion of treaſon two witneſſes are requiſite both upon the indictment and trial. *Co. Pla. Cor. p.* 24.

III. The

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(*d*) 1 *And.* 107.

(*e*) If it were only queſtionable, that was reaſon ſufficient for making ſuch proviſion. *Vide ſupra p.* 261.

(*f*) However ſince our author wrote this matter is in great meaſure ſettled by 7 *W.* 3. *cap.* 3. whereby it is enacted, " That in all caſes of high treaſon, " whereby any corruption of blood, &c. " no perſon ſhall be indicted, tried or " attainted, but upon the oaths of two " lawful witneſſes to the ſame treaſon; " but out of this act are excepted all " proceedings in parliament, or proceed- " ings for counterfeiting the king's coin, " great ſeal, privy ſeal, or ſignet or ſign " manual.

III. The third thing conſiderable in this clauſe is, what ſhall be ſaid *two lawful accuſers* within this ſtatute, if it be of force.

As to the accuſers mentiond in the ſtatute of 5 & 6 *E.* 6. *cap.* 11. they are no other than the two lawful and ſufficient witneſſes mentiond in the ſtatute of 1 *E.* 6. *cap.* 12. *in fine*; this is agreed by my lord *Coke*, *Pl. Cor. p.* 25.

Now what are lawful witneſſes in this caſe is conſiderable; the lawfulneſs of witneſſes muſt reſpect either, 1. The perſons, or elſe, 2. The teſtimony of the witneſſes.

1. As in relation to the perſons of witneſſes, thoſe are ſaid lawful witneſſes, which by the laws of *England* are allowed to be witneſſes.

A *feme covert* is not a lawful witneſs againſt her huſband (*g*) in caſe of treaſon, yet in lord *Caſtlehaven*'s caſe (*h*) upon an indictment for a rape upon his lady by another by her huſband's preſent force, ſhe was received as a witneſs by the advice of the judges, that aſſiſted at that trial, and upon her evidence he was convicted and executed.

But a woman is not bound to be ſworn or to give evidence againſt another in caſe of theft, &c. if her huſband be concerned, tho it be material againſt another, and not directly againſt her huſband. *Dalt. cap.* 111. (*i*)

Upon an indictment upon the ſtatute of 3 *H.* 7. *cap.* 2. for taking away forceably and marrying a woman, the woman ſo married may be ſworn againſt her huſband, that ſo marries her, if the force were continuing upon her till the marriage; and thus it was done in the caſe of the lady *Fulwood*, *M.* 13 *Car.* 1. *B. R. Croke* (*k*), and accordingly *ſeriatim* reſolved by all the judges of the king's bench lately in the caſe of *Brown*, *Trin.* 25 *Car.* 2. (*l*) for theſe reaſons: 1. Becauſe otherwiſe the ſtatute would be vain and uſeleſs, for poſſibly all that were preſent were of the offender's confederacy. 2. The marriage, tho a marriage *de facto*, yet, if it were effected by a continued act of force,

(*g*) *Co. Lit.* 6. *b.*

(*h*) *Hut.* 115. *Ruſh. Collect. Vol.* II. *p.* 93—101. *State Tr. Vol.* I. *p.* 386.

(*i*) *N. Edit. cap.* 164. *p.* 540.

(*k*) *Cro. Car.* 482, 484, 488, 492. the like was done in the caſe of *Haagen Swendſen*, *Mich.* 1 *Ann. B. R. State Tr. Vol.* V. *p.* 453.

(*l*) 1 *Ven.* 243. 3 *Keb.* 193.

was not a marriage *de jure*, for it was diſſolvible by divorce, unleſs ratified by a ſubſequent free cohabitation or conſent. But 3dly and principally, becauſe it was *flagrante crimine*, for the child was taken away upon the *Thurſday*, married the *Friday*, and ſeized by the guardian the next day, before they had lain together, and the force was all that while continuing upon her. 4. There were other witneſſes, that proved the firſt taking away by force againſt the child's will, tho there were no witneſſes to prove the marriage forceable but herſelf, who expreſly ſwore, that ſhe was married againſt her will; upon all which circumſtances it was ruled, that ſhe ſhould be examined in evidence, and the credibility of her teſtimony left to the jury; but moſt were of opinion, that had ſhe lived with him any conſiderable time, and aſſented to the marriage by a free cohabitation, ſhe ſhould not have been admitted as a witneſs againſt her huſband; he was convicted and had judgment of death, and was executed.

Regularly an infant under fourteen years is not to be examined upon his oath as a witneſs; but yet the condition of his perſon, as if he be intelligent, or the nature of the fact may allow an examination of one under that age (*m*), as in caſe of witchcraft an infant of nine years old has been allowed a witneſs againſt his own mother. *Dalton.* (*n*)

And the like may be in a rape of one under ten years upon the ſtatute of 18 *Eliz. cap.* 6. and the like hath been done in caſe of buggery upon a boy upon the ſtatute of 25 *H.* 8. *cap.* 6.

And ſurely in ſome caſes one under the age of fourteen years, if otherwiſe of a competent diſcretion, may be a witneſs in caſe of treaſon: *vide quæ ſupra dixi p.* 26.

A man concerned in point of intereſt is not a lawful accuſer or witneſs in many caſes, the party to an uſurious contract cannot be a witneſs to prove an uſurious contract upon an information, if the money be not paid, for he ſwears to avoid his own debt or ſecurity (*o*); but if the money be paid he

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(*m*) By the laws of *Ina* a child ten years old was allowed to be a witneſs in theft. *Vide LL. Ine*, c. 7.

(*n*) *Dalt. Juſt. N. Edit. p.* 341.

(*o*) *Co. Lit.* 6. *b.*

he may be a witneſs to prove it, where another informs, for he is to gain nothing.

And therefore if any man hath the promiſe of the goods or lands of the party attainted, he is no lawful witneſs to prove the treaſon.

A perſon outlawed in treſpaſs is nevertheleſs a lawful witneſs, but no lawful juryman or indicter in caſe of felony or treaſon, Sir *William Withipol*'s caſe. (*p*)

A father or ſon or adverſary in a ſuit is a witneſs for or againſt a perſon accuſed of any crime, yet not always a competent juryman.

A *particeps criminis* is in ſome caſes a lawful accuſer within this ſtatute, in ſome caſes not.

An approver ſhall be ſworn to his appeal, *Stamf. Pla. Cor.* (*q*); but it ſeems, that he ſhall not be a witneſs upon the trial, if the party accuſed put himſelf upon his country, becauſe, if he fail in proving the party guilty, he ſhall be hanged.

In Sir *Percy Cresby*'s caſe, *P.* 19 *Jac. Noye*'s *Rep. p.* 154. *placito* 676. *in Camera Stellatâ*, if two defendants be charged for a crime, one ſhall not be examined againſt the other to convict him of an offenſe, unleſs the party examined confeſs himſelf guilty, and then he ſhall be admitted.

9 *Dec.* 15 *Car.* 2. at *Newgate*, *Henry Trew* was indicted of burglary, and by advice of *Keeling* chief juſtice, *Brown* juſtice, and *Wilde* recorder, *Perrin*, that was in gaol for two other robberies, and confeſſed himſelf to be in this burglary, was ſworn as a witneſs againſt *Trew*, but he was not indicted of the burglaries or robberies. *Ex libro Bridgman.*

10 *Dec.* 1662. *Tonge*, *Philips*, and others (*r*) were indicted for treaſon for compaſſing the king's death, the queſtion was, whether thoſe, that were parties in the compaſſing, which were not yet pardoned, nor indicted, might be produced as witneſſes, namely *Riggs* and others; and upon conference with all the judges theſe points were reſolved.

1. That

(*p*) *Cro. Car.* 134, 147. *W. Jones* 198.

(*q*) *Lib.* II. *cap.* 56. *f.* 145. *a.*

(*r*) *Keel.* 17. *State Trials, Vol.* II. *p.* 488.

1. That the party to the treaſon, that confeſſed it, may be one of the two accuſers or witneſſes in caſe of treaſon, for the ſtatute intended two ſuch witneſſes, that were allowable witneſſes at common law, and ſo may a *particeps criminis* be admitted as a witneſs, and was admitted to give evidence to the jury; but the jury may, as in other caſes, conſider of the evidence and credit of the witneſſes, but he is ſufficient to ſatisfy the ſtatute.

2. That the confeſſion before one of the privy council or a juſtice of the peace being voluntarily made without torture is ſufficient as to the indictment or trial to ſatisfy the ſtatute, and it is not neceſſary, that it be a confeſſion in court; but the confeſſion is ſufficient, if made before him that hath power to take an examination.

3. The king having promiſed a pardon to *Riggs*, if he would diſcover the plot, he performd that part by his diſcovery; and this was held by all no impediment to his teſtimony, for the promiſe was not applied to witneſſing againſt any other; but two juſtices (ſ) held, that if the king promiſed a pardon upon condition, that he would witneſs againſt any others, and that being acknowledged by *Riggs* when he took upon him to give evidence, *&c.* that will make him uncapable to give evidence, becauſe he ſwears for himſelf (*t*); but in this point the greater number were of a contrary opinion (*u*), *ex libro Bridgman verbatim*, and I remember the conſultation and reſolution accordingly.

And accordingly at the ſeſſions of *Newgate* 1672. *Mary Price* was convicted of treaſon in clipping the current money of *England* by the teſtimony of thoſe, that were *participes criminis* (*x*), namely *Throgmorton* and others, who brought her broad money upon allowance of 10*l. per Cent.* and carried off the clipt money into their maſter's caſh.

4 The

(ſ) Theſe were our author and *J. Brown.*

(*t*) *Vide poſtea part.* 2. *cap.* 27.

(*u*) Of this contrary opinion was the court in the caſe of *Chriſtopher Layer*, *Mich.* 9 *Geo.* I. *B. R. State Tr. Vol.* VI. *p.* 259.

(*x*) But it does not appear in this caſe, whether they were promiſed a pardon or not: the like reſolution was in the caſe of *Joſeph Clark* for coining 16 *Car.* 2. ſee *Kel.* 33. but in that caſe the witneſs had actually obtained a pardon.

The like conviction was in the ſame year of *Hyde* and others of robbery upon the highway by one, that was a party in the robbery, but not indicted.

But in theſe and the like caſes 1. The party, that is the witneſs, is never indicted, becauſe that doth much weaken and diſparage his teſtimony, but poſſibly not wholly take away his teſtimony. 2. And yet, tho ſuch a party be admiſſible, as a witneſs in law, yet the credibility of his teſtimony is to be left to the jury, and truly it would be hard to take away the life of any perſon upon ſuch a witneſs, that ſwears to ſave his own, and yet confeſſeth himſelf guilty of ſo great a crime, unleſs there be alſo very conſiderable circumſtances, which may give the greater credit to what he ſwears.

If *A. B.* and *C.* be indicted of perjury on three ſeveral indictments concerning the ſame matter, *A.* pleads not guilty, *B.* and *C.* may be examined as witneſſes for *A.* for yet they ſtand unconvicted, altho they are indicted, 19. *Car.* 1. *B. R. Bilmore*'s caſe.

By the ſtatute of 1 & 2 *P. & M. cap.* 14. juſtices of peace ought to examine the party and take informations touching offenſes brought before them, and certify them at the next gaol-delivery.

Tho juſtices of peace cannot hear and determine treaſon by virtue of their commiſſion of the peace, no nor take an indictment of it, yet they may take examinations and informations touching ſuch offenſe of the party brought before them, and certify them according to that ſtatute; and thoſe informations taken upon oath, as they ought to be, and ſworn to by the juſtice or his clerk, that took them, to be truly taken, may be read in evidence againſt the priſoner, if the informant be dead, or not able to travel, and ſworn ſo to be; yea by ſome opinion, if he were bound over and appear not, they may be read, which ſeems to be queſtionable.

And in ſuch caſe information upon oath taken before juſtices of the peace of one county may be tranſmitted before juſtices of gaol-delivery of that county, where the offenſe was committed, *viz.* if the offender were brought be-

fore that juſtice; *quære tamen*, becauſe the offenſe was out of his juriſdiction; yet *vide Dalt. cap.* 111. *p.* 299. *accordant.* (y)

He, that hath a remainder expectant upon an eſtate-tail, ſhall not be allowed as a witneſs, and ſo ruled, but a diſſeiſor may be a witneſs to a deed made to the tenant. 12 *Aſſ.* 12.

Mich. 1652. A commiſſion iſſued to examine the validity of a marriage ſuppoſed to be done by force, and upon that a divorce was had: an indictment was againſt *Welſh*, that married the woman, the depoſitions in the cauſe of divorce were offered to prove the force, but rejected, becauſe in a ſuit of another nature and juriſdiction; *Welſh*'s caſe.

A man convict of conſpiracy, perjury, or forgery is not a lawful witneſs. *Crompt. de pace regis* 127. *b. Dalt. cap.* 111. (z) but if he be pardoned, it ſeems he may be a witneſs.

And thus far concerning the capacity or incapacity of the witneſſes.

2. In relation to the manner of their teſtimony, the opinion in *Dyer* of a witneſs by hearſay 1 *Mar. Dy.* 99. *b.* was rejected by all the judges in the lord *Lumly*'s caſe, *H.* 14 *Eliz. Co. Pla. Cor.* 25. but if it be a hearſay from the offender himſelf confeſſing the fact, ſuch a teſtimony upon hearſay makes a good witneſs within the ſtatute.

Tho information upon oath taken before a juſtice of peace may make a good teſtimony to be read againſt the offender in caſe of felony, where the witneſs is not able to travel, yet in caſe of treaſon, where two witneſſes are required, ſuch an examination is not allowable, for the ſtatute requires, that they be produced upon the arraignment in the preſence of the priſoner to the end that he may croſs examine them.

And thus much concerning the ſtatutes in the time of *Edward* VI. and evidence upon indictments, I ſhall only add this.

In civil actions, as treſpaſs againſt *A. B.* and *C.* if no evidence be given againſt any one to prove him guilty, he may be

4 examined

(y) *N. Edit. cap.* 164. *p.* 544. (z) *p.* 542.

examined on the part of the defendant, and ſtands as a competent witneſs; and I ſee no reaſon, why if two or three perſons be indicted, and no evidence given againſt one or more of them, but that he may be a witneſs for the other; but otherwiſe it is, if there be but a colourable evidence againſt him. (*)

CHAP. XXV.

Concerning treaſons declared and enacted *from* 1 Mar. *till this day*, viz. 13 Car. 2.

I Come to the ſtatutes concerning treaſon in the times of queen *Mary*, queen *Elizabeth*, and ſo downwards.

The firſt ſtatute in this period is 1 *Mar. cap.* 1. conſiſting of three clauſes.

1. "That no act, deed or offenſe being by act of parliament made treaſon, petit treaſon, or miſpriſion of treaſon, by words, writing, cyphering, deeds, or otherwiſe whatſoever, ſhall be taken, had, deemed, or adjudged to be high treaſon, petit treaſon, or miſpriſion of treaſon, but only ſuch, as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon, in or by the act of parliament of 25 *E.* 3. touching treaſon or the declaration of treaſons, and none other, nor that any pains of death, penalties, or forfeitures in any wiſe enſue or be to any offender or offenders for doing or committing any treaſon, petit treaſon, or miſpriſion of treaſon, other than ſuch as be in

(*) Our author ſhould here have proceeded to his fourth general head, and have ſhown, what would be a confeſſion within this ſtatute of 5 & 6 *Ed.* 6. *cap.* 11. but probably he thought that ſufficiently done by the ſecond reſolution in *Tonge's* caſe mentioned by him, *p.* 304.

" in the ſaid act ordained and provided, any ſtatute made " before or after the ſaid 25th year of *Edward* III. or any " declaration or matter to the contrary notwithſtanding.

2. " That no advantage be given by this act to any per- " ſon arreſted or impriſoned for treaſon, petit treaſon, or " miſpriſion of treaſon the laſt day of *September* laſt paſt, or " heretofore indicted or outlawed, or attainted of treaſon, *&c.* " or excepted out of the queen's pardon.

3. " That all offenſes made felony, or appointed to be " within the caſe of *præmunire* by any ſtatute ſince the firſt " day of the firſt year of king *Henry* VIII. (not being felony " or within the caſe of *præmunire* before) and all and every " branch, article, clauſe mentiond or declared in the ſame " ſtatutes concerning making of any offenſe felony, or within " the caſe of *præmunire*, and all pains and forfeitures con- " cerning the ſame, or any of them, ſhall be from hence- " forth void and repeald.

This excellent law at one blow laid flat all thoſe numerous treaſons, miſpriſions, *&c.* at any time enacted ſince 25 *E.* 3. and all felonies and *præmunires* enacted in or after 1 *H.* 8.

As touching the firſt of theſe.

1. Hereby all thoſe numerous treaſons newly enacted in any former king's time ſince 25 *E.* 3. a catalogue of moſt of which is before given, are wholly taken away.

2. Hereby all thoſe treaſons, that were declared treaſons, ſo far forth as thoſe treaſons had their ſtrength from ſuch declarations, and were not really within the ſtatute of 25 *E.* 3. are wholly taken away, and left purely to be determined according to the ſtatute of 25 *E.* 3. and ſo far forth and no farther, than that ſtatute warranteth.

And therefore the declaration of 3 *R.* 2. touching the killing of an embaſſador, namely *John Imperiall*, the declaration of 3 *H.* 5. concerning clipping and impairing of coin, the declaration of *Mortimer*'s treaſon in breaking priſon 2 *H.* 6. and all others of that kind are now wholly put out by this ſtatute, *Coke* upon the ſtatute *de frangentibus priſonam* (*a*), tho it

(*a*) 2 *Co. Inſtit.* 590.

is true, that it appears by 1 *&* 2 *P. & M. cap.* 11. they thought that clipping and impairing of money had remained treaſon by the declarative law of 3 *H.* 5. but the ſtatute of 5 *Eliz. cap.* 11. hath declared the contrary, and put that out of queſtion.

3. But it repeald not the forfeitures for old treaſons, tho thoſe forfeitures were enacted by ſtatutes made after 25 *E.* 3. and therefore the forfeiture of eſtates-tail for treaſon given by 26 *H.* 8. continues notwithſtanding this ſtatute, *Co. P. C. p.* 19. and ſo it was reſolved by all the judges of *England* in the lord *Sheffeild*'s caſe (*), *Stamf.* 187. *b.* 12 *Eliz. Dy.* 289. the reaſon is before given *cap.* 23. *p.* 241. for the relation of the repealing clauſe is only to *treaſons* not contained in 25 *E.* 3. not to *forfeitures* not contained in 25 *E.* 3. for indeed 25 *E.* 3. creates no forfeitures, but only declares what the common law was, and enacts no farther touching forfeitures.

4. But this act did not meddle with thoſe new laws, that directed ſpecial proceedings, trials, *&c.* or other matters of that nature relating to treaſon, but that was done after by 1 *&* 2 *P. & M. cap.* 10. *de quo poſtea.*

5. The preamble is very conſiderable, which takes notice of the ſeverity of former ſtatutes, that made words only without other fact, or deed, to be high treaſon, which was one of the cauſes of this general repeal.

Touching the ſecond clauſe, as is before obſerved in the precedent chapter, the repeal by 1 *Mar.* had diſcharged all offenſes committed before that repeal againſt the ſtatutes repeald, if it had not been ſpecially provided to the contrary by the proviſo of this act touching perſons formerly indicted.

Now as to the third clauſe, it alſo took away all new felonies made ſince the firſt day of the reign of *Henry* VIII. but whether either of theſe clauſes of repeal did take away thoſe previous puniſhments, which for the firſt offenſe was made forfeiture of goods, and the ſecond or third offenſe made treaſon, whether, I ſay, this ſtatute took away thoſe penalties, which were leſs than felony or treaſon in the firſt or ſecond offenſe, or only thoſe puniſhments, which were

(*) *Palm.* 351. *W. Jones* 69.

made treaſon or felony, may be a queſtion; as for inſtance, that of 1 *E.* 6. *cap.* 12. the 5th clauſe, which makes certain offenſes by words puniſhable with forfeiture of goods for firſt offenſe, loſs of profits of lands for ſecond offenſe, and treaſon for the third offenſe; whether this ſtatute extends to ſucceſſors, and (tho the penalty of treaſon for the third offenſe be repeald by this act) whether the penalties for the firſt and ſecond offenſes be repeald, ſeems to me doubtful; I rather think they are not.

And now this act having laid all former new treaſons, felonies, and miſpriſions flat, and reduced all to the ſtandard of 25 *E.* 3. the neceſſity of ſtate and public peace puts the queen and her parliament nevertheleſs to begin new proviſions.

1 *Mar. ſeſſ.* 2. *cap.* 6. "If any perſon ſhall falſly forge or "counterfeit any ſuch kind of coin of gold or ſilver, as is "not the proper coin of this realm, and is or ſhall be cur-"rent within this realm by the conſent of the queen, her "heirs or ſucceſſors, or if any perſon do falſly forge or "counterfeit the queen's ſign manual, or privy ſignet, or "privy ſeal, then every ſuch offenſe ſhall be judged high "treaſon, and the offenders, their counſellers, procurers, aid-"ers and abetters judged traitors againſt the queen, her heirs "and ſucceſſors, and ſuffer and forfeit as in high treaſon.

Concerning this ſtatute much hath been ſaid before.

1. It is a perpetual act, and not perſonal only to the queen, for as the word *king* may include a ſucceſſor, ſo the word *queen* may include a ſucceeding king or queen, and that it was ſo intended here is apparent by the words in the concluſion *ſhall be adjudged traitors againſt the queen, her heirs and ſucceſſors*; and accordingly it hath been often reſolved.

2. That the forein coin (the counterfeiting whereof is made treaſon by this act) muſt be ſuch, as is ſo made current by proclamation, for by the ſtatute of 17 *R.* 2. *cap.* 1. forein coin is not to run in payment in *England*, and therefore there muſt be an act under the great ſeal, as all proclamations ought to be, before it can be current within this ſtatute: *vide accordans ſtatut.* 5 *Eliz. cap.* 11. and 18 *Eliz. cap.* 1.

3. It muſt be a counterfeiting of that forein coin, which is ſtamped in *gold or ſilver*, *viz.* the greateſt part gold, or the greateſt part ſilver, for *denominatio ſit a majore parte*; therefore if there be a forein coin of copper, or braſs and copper, it is not within this ſtatute, but it is not neceſſary, that the counterfeit of it muſt be gold or ſilver, for if that be copper gilt, or alchymy after the ſimilitude of forein coin of gold or ſilver, it is within this act, becauſe the prototype is a coin of gold or ſilver.

1 *Mar. ſeſſ.* 2. *cap.* 12. The act againſt riotous aſſemblies is the very ſame in ſubſtance with that of 3 & 4 *E.* 6. *cap.* 5. only changing treaſon into felony within clergy, and *nota bene* the power given to ſuppreſs ſuch aſſemblies by force, and indemnifying the ſuppreſſors, tho ſome of the rioters be killed: this act was continued by 1 *Eliz. cap.* 16. during that queen's life and till the next ſeſſion after, and then expired. (*b*)

1 & 2 *P.* & *M. cap.* 3. "If any perſon ſhall maliciouſly "and of his own imagination ſpeak any falſe, ſeditious and "ſlanderous news, rumors, ſayings, or tales, of the king or "queen, then the perſon being convict and attainted, as in "the act is expreſſed, ſhall be ſet upon the pillory and have "both his ears cut off, unleſs he pay one hundred pounds, "and ſuffer three months impriſonment; and if it be of the "reporting of any other, then to ſtand on the pillory and "loſe one of his ears, unleſs he pay one hundred marks "within one month after judgment, and ſuffer one month's "impriſonment.

"And if any ſhall maliciouſly deviſe, write, print, or ſet "forth any writing containing any falſe matter of ſlander, "reproach, or diſhonor to the king or queen, or to the en-"couraging, ſtirring or moving of any inſurrection or rebel-"lion within this realm or the dominions thereof, or ſhall "procure the ſame to be written, printed, or ſet forth (the "ſaid offenſe not being puniſhable as treaſon within the ſta-"tute of 25 *E.* 3.) the offender ſhall for the firſt offenſe "have his right hand ſtricken off.

"The

(*b*) But a new act to much the ſame purpoſe was made 1 *Geo.* 1. *cap.* 5. which is perpetual.

" The ſecond of any of theſe offenſes after a former con-
" viction is made puniſhable with loſs of goods and perpetual
" impriſonment: juſtices of aſſiſe, *&c.* ſhall have power to
" hear and determine offenſes, *&c.* and to commit perſons
" ſuſpected without bail; no perſon impeachable for words,
" unleſs convict within three months after the offenſe: peers
" to be tried by their peers.

Upon this act theſe things are obſervable: 1. That the law-makers did not take ſeditious words to be within the ſtatute of 25 *E.* 3. for then they would have added the ſame clauſe as in the other caſe, *viz.* (*not being treaſon within the ſtatute of* 25 *E.* 3.) Again, 2. That they did take it, that ſome ſeditious writings might be treaſon within the ſtatute of 25 *E.* 3. for it is an overt-act, as hath been formerly obſerved (†). 3. That as ſome writings exciting inſurrection *might be* treaſon within the ſtatute of 25 *E.* 3. ſo ſome writings, that might poſſibly by conſtruction have the ſame effect, *might not be* within that ſtatute, for the law-makers cannot be ſuppoſed to intend to make any thing, that was treaſon within the ſtatute of 25 *E.* 3. to be leſs than treaſon; and by conſequence and conſequential illation many things might by a witty advocate be conſtrued and heightened to be to move inſurrection and rebellion, which immediately, and in their own nature, nor in the intention of the writer, were never ſo intended; this ſtatute died with the queen, but was revived 1 *Eliz. cap.* 6. during that queen's life.

1 & 2 *P. & M. cap.* 9. " If any by expreſs words or ſay-
" ings have prayed, or ſhall pray, that God would ſhorten
" the queen's life, or take her out of the way, or any ſuch
" like malicious prayer amounting to the ſame effect, they,
" their procurers and abetters ſhall be adjudged traitors.

" But as to any the offenſes aforeſaid perpetrated during
" that ſeſſion of parliament, if the offenders ſhall ſhew them-
" ſelves penitent upon their arraignment, no judgment of
" treaſon ſhall be given againſt them, but a leſſer puniſhment
" may be inflicted.

So

2

(†) *p.* 112.

So that they took not this to be a treaſon within the ſtatute of 25 *E.* 3. neither is it thought to be a very great offenſe, for it is an appeal to God, who we are ſure is not moved by ſuch wiſhes and prayers contrary to his own command, *Thou ſhalt not curſe the ruler of thy people*, Exod. xxii. 28.

1 & 2 *P. & M. cap.* 10. conſiſteth of ſeveral remarkable clauſes.

1. " If any during the marriage between the king and " queen ſhall imagine to deprive the king from having jointly " with the queen the ſtyle, honor and kingly name of the " realms and dominions belonging to the queen, or to de- " ſtroy the king during the matrimony, or to deſtroy the " queen, or the heirs of her body, being kings or queens of " this realm, or to levy war within the realm or marches " of the ſame againſt the king during the marriage, or a- " gainſt the queen or any of her ſaid heirs, kings or queens " of this realm, or to depoſe the queen or the heirs of her body " kings or queens of this realm from the imperial crown of this " realm, and the ſaid compaſſings maliciouſly, adviſedly and di- " rectly ſhall utter by open preaching, expreſs words or ſayings, " or if any perſon by expreſs words ſhall maliciouſly, advi- " ſedly, and directly declare or publiſh, that the king during " the marriage ought not to have jointly with the queen the " ſtyle, honor and kingly name of this realm, or that any " perſon, being neither the now king or queen, during the " marriage between them ought to have the ſtyle, honor " and kingly name of this realm, or that the now queen " is not, or of right ought not to be queen of this realm, " or after her death the heirs of her body, being kings or " queens of this realm, ought not ſo to be or to enjoy the ſame, " or that any perſon, other than the queen during her life, " or after death, other than the heirs of her body, as long as " one of the heirs of her body ſhall be in life, ought to be " queen or king of this realm, then every ſuch offender ſhall " loſe to the queen all his goods and chattles, and forfeit " the iſſues of his lands during his life, and have perpetual " impriſonment; the ſecond offenſe after a former con- " viction ſhall be treaſon.

2. "And if any by writing, printing, overt-act, or deed "ſhall maliciouſly, adviſedly and directly utter the things "aforeſaid, then they, their abetters, procurers, counſellors, "aiders, and comforters knowing the ſaid offenſe to be done, "and being thereof convicted and attainted by the laws and "ſtatutes of this realm, ſhall be adjudged high traitors, and "forfeit their goods, lands and tenements to the queen, her "heirs and ſucceſſors, as in caſe of high treaſon.

3. "Proviſion for the government of the queen's chil- "dren.

4. "If any perſon, during the time that the king ſhall "have the ordering of the queen's children, ſhall compaſs to "deſtroy the king, or to remove him from the government "of the ſaid children, it ſhall be treaſon.

5. "That all trials hereafter to be had, awarded or made "for any treaſon, ſhall be had and uſed only according to the "due order and courſe of the common laws of this realm, "and not otherwiſe, ſaving to all perſons, (other than the "offenders and their heirs, and ſuch perſons as claim to any "of their uſes,) all ſuch rights, titles, intereſts, poſſeſſion, "leaſes, *&c.* which they had at the day of the committing "of ſuch treaſons, or at any time before, as if this act had "never been made.

6. "Concealment of any high treaſon ſhall be adjudged "only miſpriſion of treaſon, and to forfeit and ſuffer as in "caſe of miſpriſion notwithſtanding this act.

7. "Trial by peers is ſaved in treaſon or miſpriſion of "treaſon.

8. "None to be impeached for words, unleſs indicted "within ſix months after the offenſe.

9. "Witneſſes examined to or depoſing any treaſons in "this act, or at leaſt two of them ſhall be brought forth "before the party arraigned, if he require the ſame, and ſay "openly in his hearing what they can ſay againſt him con- "cerning the treaſons in the indictment, unleſs the party ar- "raigned ſhall willingly confeſs the ſame upon his arraign- "ment.

10. "In

10. "In all caſes of high treaſon concerning coin current "within this realm, or counterfeiting the king's or queen's "ſignet, privy ſeal, great ſeal, or ſign manual, ſuch man- "ner of trial, and no other, ſhall be obſerved and kept, as "heretofore hath been uſed by the common laws of this "realm, any law, ſtatute or other thing to the contrary not- "withſtanding.

"The counſellors, procurers, comforters, and abetters for "the firſt offenſe to ſuffer as the principal in the firſt offenſe; "and procurers, comforters and abetters for the ſecond of- "fenſe to forfeit as the principal in the ſecond offenſe.

This ſtatute for ſo much as concerns the forfeiture or pu- niſhment inflicted for words, *&c.* and likewiſe the treaſons newly enacted was but temporary, and died when the queen died without iſſue.

But there is ſtill obſervable,

1. The great diſtinction, that was uſed between words and writing; thoſe very things, which written were made in the firſt offenſe *treaſon*, being only ſpoken were in the firſt of- fenſe *but miſdemeanor*, altho many of the words there men- tiond ſounded high, as namely that the queen is not or ought not to be queen, but ſome perſon elſe, whereby we may ga- ther the opinion of parliaments in thoſe times, that regularly words, tho of a high nature, were not treaſon, nor an overt- act of compaſſing the king's death.

The 2d thing obſervable is, that here are ſome treaſons newly enacted, which yet were treaſons within 25 *E.* 3. as compaſſing to deſtroy and depoſe the queen, and declaring the ſame by writing or overt-act; and therefore this clauſe was omitted in the ſtatute of 1 *Eliz. cap.* 6. and left to the ſtatute of 25 *E.* 3.

The 3d thing obſervable herein is, that the queen's huſ- band is not within the act of 25 *E.* 3. therefore it was neceſ- ſary to have an act of parliament for the ſecuring of him, who was only the queen's huſband.

4. That tho there was a communication of the regal title to the queen's huſband, yet even that could not have been but by act of parliament, and yet no more is communicated,

but

but the title and name, not the authority and rule of a king of *England.*

The fifth clauſe concerning reſtoring of trial of treaſon according to the courſe of the common law is of great conſequence and uſe, and is perpetual.

1. By this clauſe of the ſtatute as to the caſe of high treaſon, the ſtatutes of 27 *E.* 3. *cap.* 8. 28 *E.* 3. *cap.* 13. 8 *H.* 6. *cap.* 29. for trial of an alien *per mediotatem linguæ* are wholly repeald, and the trial ſhall be by *Engliſhmen*, 1 *Mar. Dy.* 144. *Shirly*'s caſe, *H.* 36 *Eliz.* Dr. *Lopez*'s caſe ruled *per omnes juſticiarios. Co. P. C. p.* 27.

2. The trial of a lunatic without iſſue joined by 33 *H.* 8. *cap.* 20. and in a forein county by 33 *H.* 8. *cap.* 23. and for treaſons in *Wales* 26 *H.* 8. *cap.* 6. 32 *H.* 8. *cap.* 4. are all repeald by this ſtatute. *Co. P. C. p.* 24, 27.

3. But whether the ſtatute of 1 *E.* 6. and 5 *&* 6 *E.* 6. concerning two witneſſes be hereby repeald *vide ſupra p.* 298. only the 9th and 10th clauſes of this ſtatute ſeem ſtrongly to imply, that this ſtatute intended the repeal of it, for otherwiſe why ſhould that ſpecial proviſion be added in this ſtatute, for at leaſt two of the witneſſes formerly examined to repeat their teſtimony to the priſoner, if he deſires it, when the ſtatute of 5 *&* 6 *E.* 6. had more effectually provided for the ſame thing.

4. But the ſtatute of 28 *H.* 8. *cap.* 15. concerning the trial of treaſon committed upon the high ſea is not repeald, nor the ſtatute of 35 *H.* 8. *cap.* 2. for trials of treaſons out of the realm, becauſe there was no way regularly appointed at common law for the trial of thoſe treaſons being done out of the bodies of counties; but it ſeems the trial of treaſons committed in any place in rivers, or parts within the bodies of counties, tho the admiral claimed juriſdiction there, is reſtored to the common law, where it was originally triable.

Neither doth the act extend to petit treaſon, for treaſon generally ſpoken is intended of high treaſon; therefore the trial as to that ſtands in the ſame manner, as it was before the making of that act.

5. Peremptory challenge in caſe of high treaſon is reſtored by this act, and the ſtatute of 33 *H.* 8. *cap.* 23. as to that point repeald, *vide accordant Co. P. C. p.* 27. *& libros ibi*; ſo that at this day he may challenge thirty-five, *viz.* under three juries peremptorily. *Co. P. C. ibidem.*

1 *& 2 P. & M. cap.* 11. "Whoſoever ſhall bring from the "parts beyond ſea into this realm, or into any of the domi- "nions of the ſame, any falſe and counterfeit money, being "current within this realm by the ſufferance and conſent of "the queen, knowing the ſame coin to be falſe and coun- "terfeit, to the intent to utter or make payment with the "ſame within this realm, or any of the dominions of the "ſame, by merchandizing or otherwiſe, the offenders, their "counſellers, procurers, aiders and abetters in that behalf, "ſhall be adjudged offenders in high treaſon, and after law- "ful conviction ſhall ſuffer and forfeit, as in caſes of high "treaſon.

"If any be accuſed or impeached of any offenſe within "this ſtatute, or of any other offenſe concerning the impair- "ing, forging, or counterfeiting any coin current within this "kingdom, he ſhall be indicted, arraigned, tried, convicted, "or attainted by ſuch like evidence, and in ſuch manner "and form, as hath been uſed and accuſtomed within this "realm before the firſt year of the reign of *Edward* VI. any "law, ſtatute, *&c.* to the contrary notwithſtanding.

Upon this ſtatute ſeveral things are obſervable:

1. That the forein coin in this caſe muſt be ſuch, as is made current in this realm by the conſent of the queen, which cannot be without proclamation by writ under the great ſeal, as hath been before ſaid *p.* 213 *&* 310.

2. That the party, that brings it in, muſt know it to be counterfeit.

3. That it muſt be brought into the king's dominions from ſome place, that is out of the king's dominions, and therefore the importation out of *Ireland* is held not to be an importation within this ſtatute, for that is within the dominions of this realm, tho not within the realm. 3 *H.* 7. 10. *& vide ſupra cap.* 20. *p.* 225. *Co. P. C. p.* 18.

4. It muſt be brought with an intent to merchandize or make payment within this realm, and this intent may be tried by circumſtances, tho the offender hath not yet actually made payment or merchandized with it: *vide antea p.* 229.

5. This is a new law, for the ſtatute of 4 *H.* 7. *cap.* 18. whereby it was formerly enacted, is repeald by 1 *Mar. cap.* 1.

6. It is a law perpetual, tho it ſpeaks only of coin made current by the conſent of the king and queen our ſovereign lord and lady, and ſo it hath been ſtill taken.

7. That at this time it was taken, that impairing of the coin current within this realm was treaſon as to the proper coin of this realm by force of the declarative law of 3 *H.* 5. *cap.* 6. and that this was not repeald by 1 *Mar. cap.* 1. for there was no other law in force newly enacted for making impairing of the coin treaſon between 1 *Mar. cap.* 1. and 1 *&* 2 *P. & M. cap.* 11. but this error is reformed by the declaration of 5 *Eliz. cap.* 11.

8. That without any difficulty in the caſe of counterfeiting coin current in this kingdom there is no neceſſity of two witneſſes, neither upon the trial nor upon the indictment, ſo that queſtionleſs, as to this treaſon, the clauſe of the ſtatutes of 1 and 5 *E.* 6. concerning two witneſſes is wholly repeald, for the ſtatute ſaith he ſhall be *indicted, &c.* the omiſſion of which word in the general clauſe of 1 *&* 2 *P. & M. cap.* 10. which concerns treaſons in general, is that which gave the great countenance to that opinion of my lord *Coke*, that in other treaſons there muſt be two witneſſes upon the indictment, tho that ſtatute, as to the trial, remitted the courſe of the common law.

I come now to the time of queen *Elizabeth.*

The ſtatutes, that concern treaſon, I ſhall range in three ranks: 1. Such as more immediately concern the ſafety of the queen's perſon. 2. Such as concern the money of the kingdom. 3. Such as concern the ſafety of the queen's government in relation to papal uſurpations and matter of religion.

I. I begin with the firſt rank, ſuch as concern more immediately the ſafety of the queen's perſon.

1 *Eliz. cap.* 5. The ſtatute of 1 & 2 *P. & M. cap.* 10. is recited, and that that ſtatute extended only to queen *Mary* and the heirs of her body, the very ſame ſtatute in effect is enacted over again, only with an application thereof to queen *Elizabeth*, and the heirs of her body, and almoſt all the ſame clauſes are over again, except that, which concerns the trial of treaſon according to the common law, and the clauſe of compaſſing to deſtroy the queen, and manifeſting the ſame by writing or overt-act; two witneſſes are required to the indictment and arraignment of the priſoner: this act expired upon the queen's death without iſſue.

1 *Eliz. cap.* 6. The ſtatute of 1 *Mar. ſeſſ.* 2. *cap.* 3. concerning ſeditious and falſe rumours is revived, as in relation to queen *Elizabeth*, under the ſame pains and penalties, as are therein contained, as tho the ſame act had extended to the heirs and ſucceſſors of queen *Mary*, any doubt to the contrary notwithſtanding; but this was perſonal to the queen and the heirs of her body, and was repeald by 23 *Eliz. cap.* 2.

13 *Eliz. cap.* 1. "If any perſon during the natural life of "the queen ſhall, within the realm or without, compaſs or "imagine the death or deſtruction, or bodily harm tending "to death or deſtruction, maiming or wounding of her per-"ſon, or to deprive or depoſe her from the ſtyle, honor, or "kingly name of the crown of this realm, or of any other "realm or dominion belonging to her majeſty, or to levy "war againſt her majeſty within the realm or without, or "to move or ſtir any foreiners with force to invade this "realm, or any other her majeſty's dominions being under "her obeyſance, and ſuch compaſſes, imaginations, devices, "or intentions, or any of them ſhall maliciouſly, adviſedly, "and directly publiſh, hold opinion, affirm or ſay by any "ſpeech, expreſs words or ſayings, that the queen during "her life is not, or ought not to be queen of this realm of "*England*, and alſo of *France* and *Ireland*, or of any other "her majeſty's dominions being under her obeyſance during "her life, or ſhall by writing, printing, preaching, ſpeech, "expreſs words or ſayings, maliciouſly, adviſedly, and di-

"rectly

" rectly publiſh and affirm, that the queen is an heretic, " ſchiſmatic, tyrant, infidel, or uſurper of the crown, every " ſuch offenſe ſhall be taken, deemed and declared by autho- " rity of this parliament to be high treaſon; and the offen- " ders, their abetters, counſellors and procurers, and the " aiders and comforters of the ſame offenders, knowing the " ſame, being indicted, convicted and attaint according to " the uſual order and courſe of the common law, or accord- " ing to the act of 35 *H.* 8. for trial of treaſons out of the " realm, ſhall be deemed traitors, and ſuffer and forfeit as " traitors.

2. " If any perſon of any condition, place or nation, du- " ring the queen's life pretend, utter, or publiſh themſelves, " or any of them, or any other, than the now queen, to have " right to enjoy the crown of *England* during the now queen's " life, or ſhall during the queen's life uſurp the crown, or " the royal title, ſtyle or dignity of the crown of *England*, or " ſhall during the queen's life hold, or affirm, that the now " queen hath not right to hold the ſaid crown, realm, ſtyle, " title or dignity, or ſhall not after demand made on the be- " half of the queen acknowledge effectually, that the now " queen is true and rightful queen of this realm, they ſhall " be diſabled during their natural lives only to enjoy the " crown by ſucceſſion after the queen's death, as if ſuch per- " ſon were naturally dead.

3. " If any perſon ſhall during the queen's life hold or " affirm a right, intereſt or ſucceſſion to the crown to be in " any ſuch claimer, uſurper or pretender, or not acknow- " ledger after notification by proclamation of ſuch claim, uſur- " pation or pretenſe, ſuch perſon ſhall ſuffer as a traitor.

4. " If any ſhall maintain, that the common laws, not al- " tered by parliament, ought not to direct the right of the " crown of *England*, or that the queen [*Elizabeth*] with and " by the authority of parliament is not able to make laws of " ſufficient force to limit and bind the crown of *England*, " and the deſcent, limitation, inheritance, and government " thereof, or that this ſtatute, or any ſtatute to be made by " authority of parliament with the queen's royal aſſent for

" the limiting of the crown to be juſtly in the queen's per-
" ſon is not, or ought not to be of ſufficient force to bind,
" limit, reſtrain, and govern all perſons, their rights and ti-
" tles, that in any way might claim an intereſt, or poſſibi-
" lity in or to the crown of *England* in poſſeſſion, remain-
" der, inheritance, ſucceſſion, or otherwiſe, every ſuch per-
" ſon ſo holding, affirming or maintaining during the queen's
" life ſhall be judged a high traitor, and every perſon ſo
" holding after the queen's death ſhall forfeit all his goods
" and chattles.

5. " If any by writing or printing declare, before the
" ſame be declared and eſtabliſhed by act of parliament, that
" any particular perſon ought to be right heir to the queen
" (except the natural iſſue of her body) or that ſhall print,
" ſet up, or ſell ſuch book, for the firſt offenſe he ſhall ſuf-
" fer one year's impriſonment, and forfeit half his goods;
" and for the ſecond offenſe it ſhall be a *præmunire*.

6. " Trial of a peer by his peers is ſaved.

7. " Saves the right of all, other than the offenders and
" their heirs, claiming only as heir to the offender.

8. " Offender within the queen's dominions ſhall be in-
" dicted within ſix months, and out of the dominions within
" twelve months.

9. " No perſon to be arraigned for any offenſe within this
" act, unleſs it be proved by the teſtimony, depoſition, or
" oath of two lawful and ſufficient witneſſes, who ſhall at
" the time of the arraignment of ſuch perſon be brought be-
" fore the party offending face to face, and there declare all
" they can ſay againſt the party arraigned, unleſs the party
" arraigned ſhall without violence confeſs the ſame.

10. " The aider or comforter of ſuch, as ſhall affirm the
" queen a ſchiſmatic, heretic, tyrant, infidel, or uſurper, ſhall
" for his firſt offenſe, knowing the ſame to be committed,
" incur a *præmunire*, and for his ſecond offenſe, after con-
" viction of the former, ſhall be a traitor.

11. " Provided, that giving charitable alms in money,
" meat, drink, apparel or bedding for ſuſtentation of the
" body, or health of any offender in any offenſe, made trea-

" ſon or *præmunire*, during the time of his impriſonment, " ſhall not be taken to be any offenſe.

Tho this act be antiquated by the death of queen *Elizabeth*, yet there are (as in other acts of this nature that are expired) divers matters that are obſervable for the true underſtanding of the common law, and therefore I have repeated many acts of this nature at large.

1. This act doth contain and enact ſome treaſons as new treaſons, which certainly were treaſons by the ſtatute of 25 *E.* 3. as compaſſing to deſtroy or depoſe the queen, and manifeſting the ſame by writing, printing, or overt-act; but it was thought or at leaſt doubted, that manifeſting the ſame barely by words were not within 25 *E.* 3. and it appears by the preamble, that this act was made to take away ſome doubts, as well as to provide new remedies.

2. It partly appears by this act, that the bare conſpiracy to levy war was not treaſon by the ſtatute of 25 *E.* 3. without a war levied, and accordingly it was reſolved *P.* 39 *Eliz.* *Burton*'s caſe, *Co. P. C. p.* 10. and therefore we are to be careful not to apply all convictions of treaſon in the queen's time, as judgments declarative of the ſtatute of 25 *E.* 3. *de proditionibus*, becauſe they were oftentimes indicted upon this ſtatute in the queen's time, and the general concluſion of the indictment *contra formam ſtatuti*, and ſometimes generally *contra formam ſtatut.* with an abbreviation was applicable to any ſtatute then in force, which was moſt effectual to this purpoſe.

In *Anderſon*'s reports, *part.* 2. *n.* 2. (*c*), it appears that in 37 *Eliz.* divers apprentices were committed for great riots, divers other apprentices conſpired to deliver them out of priſon, to kill the lord mayor of *London*, to burn his houſe, to break open two houſes near the *Tower*, where there were arms for three hundred men, and to furniſh themſelves; after which divers apprentices threw about libels moving others to join with them and to aſſemble at *Bunhill*, where divers to the number of three hundred aſſembled, where they had a trumpet and a cloke upon a pole inſtead of a flag, and as they were

(*c*) 1 *Anderſ. p.* 4.

were going towards the mayor's houſe, they were met by the ſheriffs and ſwordbearer, againſt whom the apprentices offered reſiſtance.

It was reſolved, that this was treaſon within the ſtatute of 13 *Eliz.* for it was an intention to levy war, and altho they intended no harm to the perſon of the queen, yet becauſe it concerned her in her office and authority, and was for ſuch things, which the queen by law and juſtice ought to do, it was a levying war againſt the queen, and they were condemned and executed.

This proceeding was upon this ſtatute, and yet perchance, the circumſtances of the caſe wholly laid together, this might have been an actual levying of war within 25 *E.* 3. but they thought it ſafer to proceed upon this ſtatute.

3. That, tho regularly words alone make not an overt-act of compaſſing of the queen's death, yet printing or writing may do it, *Co. P. C. p.* 12, 14. and therefore an act of parliament was requiſite to make it an overt-act; yet obſerve how cautiouſly it is penned, *maliciouſly, adviſedly, and directly, &c.* leaving as little, as poſſibly may be, to conſtruction.

4. That defamatory words, tho of a very high nature, do not always make treaſon; there cannot be more venomous words ordinarily thought of, than to ſay, the queen was an *heretic, ſchiſmatic, tyrant, uſurper*, yet an act of parliament was neceſſary to make it treaſon.

5. That to make a man a principal in treaſon by comfort or aid after the offenſe committed it muſt be *knowingly*, and therefore I never thought that opinion of *Stamford, fol.* 41. *b.* to be law, that a receipt of a felon after attainder in the ſame county made a perſon acceſſary without notice, becauſe he is bound at his peril to take notice, that he was attainted, for it oftentimes lies as little in the knowledge of many perſons, who are convict or attainted of felony or treaſon, as whether a man be guilty of it: *vide tamen Dyer* 355.

6. That regularly in a new treaſon the aiding and comforting of the traitors, knowing them to be ſuch, makes a man guilty of treaſon, and therefore here is care by expreſs proviſion to make the firſt offenſe a *præmunire*.

7. Here

7. Here is great care to diſable the heir to the crown from ſucceeding, if he uſurp during the queen's life; but tho all the care imaginable was there uſed, yet it hath been held, that by the acceſſion of the crown to the perſon ſo diſabled, all theſe diſabilities have vaniſhed, *vide* 1 *H.* 7. 4. (*d*): ſee Mr. *Plowden*'s learned tract touching the right of ſucceſſion of *Mary* queen of *Scotland*.

8. *Nota* concerning the power of the king to limit the crown by conſent of parliament.

9. That they took the ſtatutes of 1 and of 5 & 6 E. 6. concerning two witneſſes to be determined, or at leaſt not to extend to treaſons afterwards enacted, for otherwiſe there needed not this ſpecial care and proviſion *de novo* for two witneſſes.

10. That as the aiding or comforting of one, that ſpeaks ſeditious words, made treaſon on the ſecond conviction, muſt be for the ſecond offenſe after a conviction of the former, ſo the ſecond offenſe, tho committed after a former, is not treaſon, unleſs it be alſo committed after a former conviction: the like method is in forgery upon the ſtatute of 5 *Eliz. cap.* 14. and generally that expoſition holds in moſt caſes, where the ſecond offenſe is ſubjected to a ſeverer puniſhment than the former, for it is intended of ſuch offenſe committed after the conviction of a former, *Co. P. C.* 172.

11. It is provided that charitable relief ſhall not make a party guilty of treaſon or *præmunire*, as an aider or abetter; this was a neceſſary proviſion to avoid queſtion.

Regularly relief by victuals or clothes of a felon or of a traitor, after he is in cuſtody or under bail, makes not a man an acceſſary in felony, nor a principal in treaſon; but if he help

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(*d*) The words of that book are, *That the king was a perſon able and diſcharged from any attainder* eo facto, *that he took upon him the government and the being king*; ſo that it was not the bare acceſſion or deſcent of the crown, but the being in actual poſſeſſion of the regal government, which was conſtrued to remove all diſabilities; this caſe therefore is no argument, that the ſtatute of 13 *Eliz.* could not bar the right of the ſucceſſor, and hinder him from ſucceeding, but only that if notwithſtanding he ſhould get poſſeſſion of the government, that poſſeſſion would purge all diſabilities, which is juſt as much as to ſay, that he, who can get the power into his hands notwithſtanding an attainder or act of parliament to the contrary, will not think himſelf bound by ſuch attainder or act of parliament.

help him to eſcape, that makes him an acceſſary in one caſe and a principal in the other, *Dalt. cap.* 108. *p.* 286. (*e*), and with this agrees this proviſo in the caſe of high treaſon; but *nota* it extends no farther than during the time of his impriſonment, yet the law is all one, if he be under bail, for he is *in cuſtodiâ* ſtill, for the bail are in law his keepers, and he, that is deliverd to bail in the king's bench, is nevertheleſs ſaid to be *in cuſtodiâ mareſcalli.*

14 *Eliz. cap.* 1. "If any perſon do within this realm, or "elſewhere unlawfully, and of his own authority compaſs, "imagine, conſpire, practiſe, or deviſe by any ways or means "with force, or by craft maliciouſly and rebelliouſly to take, "detain or keep from the queen any of her towers, caſtles, "fortreſſes or holds, or maliciouſly and rebelliouſly take, burn "or deſtroy them, having any of the queen's munition in "them, or being appointed to be guarded with ſoldiers within "the queen's dominions, and the ſame compaſſing do adviſedly by expreſs words or deeds utter and declare for any "the malicious or rebellious intents aforeſaid, it ſhall be adjudged felony in the offenders, their aiders, comforters, "counſellers and abetters without clergy.

"If any ſhall with force maliciouſly or rebelliouſly detain "from the queen any of her majeſty's cattles, towns, forteſſes or holds within any of her dominions, or any of "her ſhips, ordinance or artillery, or munition of war, and "not render the ſame within ſix days after proclamation, or "wilfully or maliciouſly burn or deſtroy any of her ſhips, "or bar any of her havens, this ſhall be treaſon.

This act to continue during the queen's life.

We may ſee by this act, that the opinion of the parliament in that time was, that this conſpiring to take forts or ſhips by force or deceit was not treaſon; but indeed the actual taking them by force was levying of war againſt the king by the ſtatute of 25 *E.* 3.

But if a man detains the king's town, or caſtle, or ſhips, and when any commiſſionated by the king demands the ſame, and it is refuſed to be deliverd, and thereupon the king's

(*e*) *N. Edit. cap.* 161. *p.* 531.

commiſſioner raiſeth a power, makes an aſſault, and they within ſtand upon their guard, and repel force with force, this had been treaſon within the ſtatute of 25 *E.* 3. for it is a levying war, and ſo not a bare detaining; *quod vide Co. P. C. p.* 10. *bis in eâdem paginâ.*

Again, if this detaining the king's caſtle, or fort, or the caſtle of any other, be barely ſuch and without aſſault, yet if it be in compliance with a forein enemy, or in confederacy with him, this is treaſon within the act of 25 *E.* 3. and an overt-act of adhering to the king's enemies; that therefore, which this act makes treaſon in detaining after proclamation, is a ſimple detaining without the concurrence of the circumſtances above-mentiond, which was not treaſon before the making of this act.

14 *Eliz. cap.* 2. "If any perſon ſhall conſpire, imagine, or "go about unlawfully and maliciouſly to ſet at liberty any "perſon committed by the queen's ſpecial command for any "treaſon or ſuſpicion of treaſon concerning the perſon of "the queen before indictment of the perſon impriſoned, and "ſuch imagination or conſpiracy ſhall ſet forth, utter or de-"clare by expreſs words, writing, or other matter, it ſhall "be miſpriſion of treaſon; but if the party impriſoned be "indicted of any treaſon concerning the perſon of the "queen, it ſhall be felony ſo to conſpire and declare ſuch "conſpiracy, *ut ſupra.*

"If it be after attainder or conviction, then ſuch conſpi-"racy ſo declared as aforeſaid ſhall be high treaſon:" this act to laſt during the queen's life.

Theſe things are obſervable upon this act, 1. Here is no proviſion againſt the actual diſcharge or ſetting at liberty, neither needed it, for if the party committed had really committed treaſon, this was treaſon even within the ſtatute of 25 *E.* 3. but if it were only a commitment for treaſon, but no treaſon committed by the perſon in cuſtody, ſuch delivery was not treaſon, as appears before *cap.* 22. But 2. The conſpiracy to do this, tho manifeſted by open act, was neither treaſon, miſpriſion of treaſon, nor felony; neither is it at this day, but only a bare miſdemeanor puniſhable by fine

and impriſonment, tho the party impriſoned were indicted, yea attainted. And 3. This act extends only to ſuch treaſons, as concerned immediately the queen's perſon, not to treaſons touching her ſeal or coin.

And theſe are all the acts, that were made in the queen's time touching treaſons, which more eſpecially related to the ſafety of her perſon, all which expired at her death.

II. I come to thoſe treaſons, which were enacted in the queen's time concerning coin, and they are three.

5 *Eliz. cap.* 11. "Makes the filing, waſhing, rounding, and "clipping of the coin of this realm, or forein coin made cur- "rent by proclamation, for lucre or gain, and their coun- "ſellors, conſenters and aiders to be high treaſon by virtue "of this act.

14 *Eliz. cap.* 3. "Makes the counterfeiting of forein coin "of gold or ſilver, not current within this realm, miſpriſion "of treaſon in the offenders, their procurers, aiders and abet- "ters.

18 *Eliz. cap.* 1. "Makes the impairing, diminiſhing, falſi- "fying, ſcaling or lightning of the coin of this kingdom or "forein coin made current by proclamation for lucre-ſake to "be high treaſon in the offenders, their counſellors, con- "ſenters and aiders.

But of theſe ſufficient hath been ſaid before in the buſineſs of money, forfeiture and upon the ſtatutes of 1 and 5 & 6 *E.* 6. The ſum of which is this:

1. That the treaſons made by the acts of 5 and 18 *Eliz.* are new treaſons, newly made by virtue of this act, and every body is eſtopped to ſay the contrary by reaſon of the ſpecial recital and penning of this act, *viz. ſhall be adjudged treaſon by virtue of this act.*

2. That the forein coin, the clipping and impairing whereof is made treaſon by this act, muſt be ſuch as is made current by proclamation, for it cannot be otherwiſe current by reaſon of the prohibition of the ſtatute of 17 *R.* 2. *cap.* 1. and alſo, the word *proclamation* in thoſe acts refer to forein coin ſo legitimated by proclamation, not to the proper coin of this kingdom, which needs not a proclamation to legitimate it.

3. The

3. The trial and whole proceeding is to be according to the courſe of the law by the expreſs words of theſe acts and of 1 & 2 *P. & M. cap.* 11. and therefore there need not two witneſſes required by the acts of 1 and the 5 & 6 *E.* 6.

4. Not only the offenders themſelves, but the counſellors, conſenters and aiders are within thoſe acts; but altho regularly in caſe of any old or new treaſon made, the comforters and receivers of the offender are impliedly guilty of treaſon by a kind of neceſſary concomitance, yet it ſeems to me by the ſpecial penning of this act, it extends only to counſellors, aiders and conſenters (according to the reſolution in *Conyer*'s caſe, *Dy.* 296.) as to the offenſes made treaſon by thoſe acts, tho poſſibly it may be treaſon, as to the receiver of a counterfeiter within the ſtatute of 25 *E.* 3. according to my lord *Coke*'s opinion, *Co. P. C. cap.* 64. *p.* 138. for that is an old treaſon, and no ſuch reſtriction by expreſs words to counſellors, aiders and aſſenters.

5. The clipping and impairing, that makes treaſon within theſe acts, muſt by the expreſs words of the act be *for gain or lucre*, and ſo laid in the indictment.

6. Counterfeiting of coin not current to bring it within a *præmunire* by the ſtatute of 14 *Eliz. cap.* 3. muſt be a counterfeiting of ſuch forein coin, as is of gold or ſilver, or conſiſts thereof for the greateſt part, and extends not to the forein copper, or leather coin.

7. No corruption of blood or loſs of dower are to be by attainders of theſe treaſons.

III. Therefore I come to the third ſort of ſtatutes made in this queen's time, which relate to the queen's government, and eſpecially in relation to papal uſurpation.

1 *Eliz. cap.* 3. is an act of recognition of the queen to be rightful ſoverein of this realm, and all acts repugnant thereunto are repeald; and *cap.* 1. the oath of ſupremacy is enacted to be taken by the perſons therein deſcribed: the tenor of which oath followeth in theſe words, *viz.*

" I *A. B.* do utterly teſtify and declare in my conſcience, " that the queen's highneſs is the only ſupreme governor of

" this realm, and of all other her highneſs's dominions and " countries, as well in all ſpiritual or eccleſiaſtical things or " cauſes, as temporal, and that no forein prince, perſon, " prelate, ſtate, or potentate hath or ought to have any ju- " riſdiction, power, ſuperiority, preeminence or authority, " eccleſiaſtical or ſpiritual within this realm, and therefore " I do utterly renounce and forſake all forein juriſdictions, " powers, ſuperiorities and authorities, and do promiſe, that " from henceforth I ſhall bear faith and true alligeance to " the queen's highneſs, her heirs and lawful ſucceſſors, and " to my power ſhall aſſiſt and defend all juriſdictions, privi- " leges, preeminences and authorities granted or belonging " to the queen's highneſs, her heirs and ſucceſſors, or united " and annexed to the imperial crown of this realm." So help me God and by the contents of this book. (*f*)

Every perſon appointed to take the oath, and refuſing, ſhall loſe his offices and benefices, and be diſabled to take any office or benefice, *&c.* and then proceeds to other penalties upon refuſers.

And by that act it is enacted, " That if any perſon inha- " biting within the queen's dominions ſhall by writing, " printing, teaching, preaching, expreſs words, deed or act " adviſedly, maliciouſly, and directly affirm, hold, ſtand " with, ſet forth, maintain, or defend the authority, preemi- " nence, power or juriſdiction ſpiritual or eccleſiaſtical of " any forein prince, prelate, perſon, ſtate or potentate what- " ſoever, heretofore claimed, uſed or uſurped within this " realm, or any dominion or country under the queen's o- " beyſance, or ſhall adviſedly, maliciouſly, and directly put " in ure, or execute any thing for the extolling, advance- " ment, ſetting forth, maintenance, or defenſe of any ſuch " pretended or uſurped juriſdiction, power, preeminence or " authority, or any part thereof, every perſon ſo offending, " his abetters, aiders, procurers and counſellers, being con- " victed according to the courſe of the common law, ſhall

(*f*) This oath, and this ſtatute ſo far as relates to the ſaid oath, are abrogated by 1 *W. & M. cap.* 8.

" for the firſt offenſe forfeit his goods and chattles, and, if " not worth twenty pounds, ſhall alſo ſuffer a year's impri- " ſonment, and all his eccleſiaſtical benefices and dignities " ſhall be void, and for a ſecond offenſe committed after at- " tainder of the firſt ſhall be within penalty of *præmunire*, " and for the third offenſe committed after his ſecond con- " viction, it ſhall be adjudged high treaſon.

None to be impeached for words only, unleſs indicted within a year after the offenſe committed; and if impriſoned, to be ſet at liberty, unleſs indicted within half a year after the offenſe: trial of a peer by peers.

None to be indicted, *&c.* without two witneſſes, which if living ſhall be brought face to face before the priſoner upon his arraignment, and teſtify what they can ſay, if the priſoner require it.

Giving of relief, aid or comfort to offenders ſhall not be puniſhable, unleſs proved by two witneſſes, that he had notice of the offenſe at the time of ſuch relief given.

5 *Eliz. cap.* 1. " If any perſon dwelling, inhabiting, or re- " ſiant within the queen's dominions or under her obeyſance, " ſhall by writing, cyphering, printing, preaching, deed or " act, adviſedly and wittingly hold, or ſtand with, to ex- " tol, ſet forth, maintain or defend the authority, juriſdiction, " or power of the biſhop of *Rome*, or his ſee, heretofore " claimed, uſed, or uſurped within this realm or any domi- " nion or country under the queen's obeyſance, or by ſpeech, " open act or deed adviſedly and wittingly attribute any ſuch " manner of juriſdiction, authority, or preeminence to the " ſaid ſee or biſhop of *Rome* for the time being within this " realm or any the queen's dominions, then every ſuch per- " ſon, their procurers, abetters and counſellers, and alſo " their aiders, comforters and aſſiſtants upon the purpoſe a- " foreſaid, to extol the authority of the biſhop of *Rome*, be- " ing lawfully convicted within one year ſhall incur a *pre-* " *munire*.

It directs who ſhall take, and give the oath of ſupremacy.

Any perſon appointed to take this oath by this ſtatute or the ſtatute of 1 *Eliz.* who ſhall refuſe to take the ſame, being

thereof lawfully indicted within one year, and convict or attaint at any time after, ſhall incur a *præmunire.* 16 *R.* 2.

Certificate of refuſal to be made into the king's bench within forty days after refuſal; the king's bench may proceed to indict the party refuſing within a year by a jury of the ſame county, where the court ſits.

If any perſon convict of the offenſes within the firſt clauſe of the ſtatute ſhall after conviction thereof do the ſaid offenſes or any of them, or if any perſon appointed to take the oath, do after three months after the firſt tender refuſe to take the ſame being tendred a ſecond time, the offender ſhall ſuffer as in caſe of high treaſon.

Attainder of treaſon upon this act ſhall not make corruption of blood, diſherit the heir, or forfeit dower.

Members of the houſe of commons ſhall take the ſaid oath, otherwiſe ſhall be diſabled to ſit.

Temporal lords of parliament ſhall not be bound to take the oath, nor ſubject to the penalties for refuſing the ſame.

The charitable giving of reaſonable alms to an offender without fraud or covin ſhall not be conſtrued an abetting, counſelling, aiding, aſſiſting, procuring or comforting of an offender within this act: peers indicted ſhall be tried by peers, as in other caſes of treaſon.

No perſon compellible to take the oath upon ſecond tender, but ſuch as have eccleſiaſtical preferments, or ſuch as have offices in eccleſiaſtical courts, or ſuch as refuſe wilfully to obſerve the orders eſtabliſhed for divine ſervice, or ſuch as ſhall deprave the rites and ceremonies of the church of *England*, or that ſhall ſay or hear private maſs.

Not lawful to kill perſon attaint in *præmunire.*

No perſon to be indicted for aiding, aſſiſting, comforting, abetting any perſon for extolling the power of the biſhop of *Rome*, unleſs accuſed by ſuch lawful proof, as ſhall be thought by the jury ſufficient to prove him guilty of the offenſe.

The things obſervable upon this act,

1. Tho the indictment for the refuſal of the oath upon the firſt tender may be in the county, where the king's bench

bench ſits, yet the trial muſt be by a jury of the county where the refuſal is, 6 & 7 *Eliz. Dy.* 234. *a. Bonner's* caſe.

2. If books extolling the pope's juriſdiction be written beyond ſea, and brought in hither, it was ruled by the advice of all the judges, 1. The importer, that delivers them out to extol the pope's authority. 2. He that reads them, and in conference with others allows them to be good. 3. He that hears the contents, and in open ſpeech with others commend and affirm them to be good. 4. He that hath ſuch books in his cuſtody, and ſecretly conveys them to his friends to the intent to perſwade them to be of that opinion. 5. He that prints ſuch books in this realm, and utters them, are within the firſt clauſe of this ſtatute againſt extolling of papal authority; but thoſe that receive and read them without allowing them in conference, are not within this act.

3. An indictment againſt an aider, &c. muſt be, *knowing* the principal to be a maintainer of the juriſdiction of the pope, and *contra formam ſtatuti* only, is not ſufficient. *Dy.* 363. *a.*

4. *Nota* this ſpecial clauſe of giving alms not to make an aider or comforter, if the alms be reaſonable, and without covin, tho the offender not impriſoned, nor under bail, ſeems to be but agreeable to the common law; *vide quæ ſupra dicta ſunt ſuper ſtatutum* 13 *Eliz. cap.* 1. and therefore it ſeems, even by the common law, if a phyſician or chirurgeon miniſter help to an offender ſick or wounded, tho he know him to be an offender, even in treaſon, this makes him not a traitor, for it is done upon the account of common humanity, not *intuitu criminis vel criminoſi*; but it will be miſpriſion of treaſon, if he know it, and do not diſcover him.

23 *Eliz. cap.* 1. "All perſons whatſoever, who have or "ſhall have or pretend to have power, or ſhall any way put "in practice to abſolve, perſwade, or withdraw any of the "queen's ſubjects, or any within her dominions from their "natural obedience to her majeſty, or to withdraw them for "that intent from the religion now by her highneſs's au-"thority eſtabliſhed within her highneſs's dominions to the

" *Romiſh* religion, or to move them or any of them to pro-
" miſe any obedience to any pretended authority of the ſee
" of *Rome*, or of any other prince, ſtate or potentate, to be
" had or uſed within her dominions, or ſhall do any overt-
" act to that intent or purpoſe, they ſhall be adjudged trai-
" tors; and the perſons who ſhall be willingly abſolved, or
" withdrawn as aforeſaid, or willingly reconciled, or ſhall
" promiſe obedience to any ſuch pretended authority, prince,
" ſtate, or potentate as aforeſaid, they, their procurers and
" counſellors thereunto ſhall ſuffer as in caſe of high
" treaſon.

" Aiders and maintainers of the perſons offending, know-
" ing the ſame, or who ſhall conceal ſuch offenſe, and not
" within twenty days diſcloſe the ſame to ſome juſtice of
" peace, *&c.* ſhall forfeit as in miſpriſion of treaſon: ju-
" ſtices of peace to have cogniſance of offenſes, except treaſon
" and miſpriſion of treaſon.

Nota, the words (*for that intent*) run through the whole clauſe of diſſwading from the religion of the church of *England*: *vide poſtea* ſtatute 3 *Jac. cap.* 4.

The religion eſtabliſhed within the meaning of this act ſeems to be that book of articles mentiond and enjoind to be aſſented to by all men taking orders by the ſtatute of 13 *Eliz. cap.* 12.

23 *Eliz. cap.* 2. " Adviſed and malicious ſpeakers of ſedi-
" tious or ſcandalous tales of the queen of their own imagi-
" nation ſhall for the firſt offenſe be ſet upon the pillory, loſe
" both ears (or at the offender's election pay two hundred
" pounds) and ſuffer ſix months impriſonment.

" If any ſhall adviſedly and with malicious intent report
" falſe, ſeditious and ſlanderous news or tales of the queen of
" the reporting of another, then to be ſet on the pillory and
" loſe one of his ears (unleſs he pay two hundred marks)
" and ſuffer impriſonment three months: ſecond offenſe af-
" ter a firſt conviction ſhall be felony without clergy.

" If any ſhall within or without the queen's dominions
" adviſedly and with a malicious intent againſt the queen de-
" viſe and write, print, or ſet forth any book or writing,

" containing any falſe, ſeditious or ſcandalous matter againſt " the queen, or to the encouraging, ſtirring, or moving any " inſurrection or rebellion within the realm or dominions " thereof; or if any perſon within or without the realm ſhall " adviſedly, and with a malicious intent againſt the queen " procure, or cauſe any ſuch book or writing to be written, " printed, publiſhed or ſet forth, (the ſaid offenſe not being " puniſhable by the ſtatute of 25 *E.* 3. concerning treaſon, " or by any other ſtatute, whereby an offenſe is made or de- " clared treaſon) every ſuch offenſe ſhall be judged felony " without the benefit of clergy.

" If any perſon either within or without the queen's do- " minions ſhall by erecting a figure, caſting nativities, pro- " phecying, witchcraft, conjurations, or other like unlawful " means ſeek to know, and ſhall ſet forth by expreſs words, " deeds, or writings, how long the queen ſhall live, or who " ſhall reign after her, or maliciouſly utter any direct prophe- " cies to that purpoſe, or ſhall maliciouſly by words, writings " or printing wiſh, will or deſire the death or deprivation of " the queen, or any thing directly to the ſame effect, the of- " fender, their aiders, procurers and abetters in or to the ſaid " offenſes ſhall ſuffer as felons without the benefit of clergy.

Offenſes made felony by this act committed by perſons out of the realm ſhall be inquired, heard and determined in the county, where the king's bench ſits, and limits the proof and manner of proceeding; no corruption of blood, loſs of dower, or forfeiture of lands longer than during life.

Two witneſſes required to prove words.

The act of 1 & 2 *P. & M.* and 1 *Eliz.* concerning ſcandalous words are repeald: this act to continue only during the queen's life.

Theſe things are obſervable upon this act,

1. There may be ſome words or writings, that conſequentially may be conſtrued to ſtir up inſurrection, and yet are not within the ſtatute of 25 *E.* 3. for this ſtatute ſuppoſes ſome may be within it, and ſome may not.

2. That caſting the king's nativity, how long he ſhall live, who ſhall ſucceed him, or uſing prophecies to that effect, tho done

done maliciouſly, or wiſhing the king's death, was not treaſon within the act of 25 *E.* 3. or of any ſtatute then in force, tho they are great offenſes; for had they been treaſon, this ſtatute would never have made it only felony, and that only during the queen's life.

27 *Eliz. cap.* 1. "If any open invaſion or rebellion ſhall "be made within her majeſty's dominions, or any act at- "tempted tending to the hurt of her majeſty's perſon by or "for any perſon, that ſhall or may pretend title to the crown "after the queen's death, or if any thing ſhall be compaſſed "or imagined tending to the hurt of the queen's perſon by "any perſon or with the privity of any perſon, that ſhall "or may pretend title to the crown of this realm, then by "her majeſty's commiſſion twenty-four privy counſellors and "lords of parliament at leaſt, with the aſſiſtance of ſuch "judges of the courts of *Weſtminſter*, as the queen ſhall ap- "point, or the greater number of them, ſhall by virtue of "this act have authority to examine all and every the of- "fenſes aforeſaid, and all circumſtances thereof, and there- "upon to give ſentence or judgment, as upon good proof "the matter ſhall appear unto them; and after ſuch ſen- "tence or judgment given, and declaration thereof by her "majeſty's proclamation under the great ſeal, all ſuch per- "ſons, againſt whom ſuch judgment or ſentence ſhall be gi- "ven or publiſhed, ſhall be excluded and diſabled to claim "or pretend to have any title to the crown of *England*.

"And all the queen's ſubjects may by virtue of this act "and her majeſty's direction by all poſſible means purſue to "death every ſuch wicked perſon, by whom ſuch invaſion "or wicked act ſhall be attempted, or other thing compaſ- "ſed or imagined againſt her majeſty's perſon, and all their "aiders, comforters and abetters.

Proviſion is made in caſe the queen ſhould be killed by ſuch attempt for proſecution of the offender, and excluſion of the perſon offending from ſucceſſion to the crown, *&c.*

Nota, this extraordinary commiſſion was iſſued thus by authority of parliament in relation to the queen of *Scots*, who was by virtue thereof ſentenced to death and executed.

This

This was but a temporary act, but the precedent of this commiſſion to ſentence and give judgment without a trial by jury was the firſt of that nature, that I remember to have been iſſued by parliament.

27 *Eliz. cap.* 2. " It ſhall not be lawful for any jeſuit, ſeminary prieſt, or other ſuch prieſt, deacon, or religious or eccleſiaſtical perſon whatſoever being born within this realm or other her highneſs's dominions, and made, ordained or profeſſed, or to be made, ordained or profeſſed by any authority or juriſdiction derived, challenged or pretended from the ſee of *Rome* by or of what name, title or degree ſoever the ſame ſhall be called or known, to come into, be or remain in any part of this realm, or any of her highneſs's dominions after the end of forty days, other than in ſuch ſpecial caſes, and upon ſuch ſpecial occaſions only, and for ſuch time only, as is expreſſed in this act; and if he do, then every ſuch offenſe ſhall be high treaſon, and every ſuch perſon as ſhall wittingly and willingly receive, relieve, comfort, aid, or maintain any ſuch prieſt, *&c.* being at liberty and out of hold, knowing him to be ſuch, ſhall be guilty of felony without clergy.

" If any of the queen's ſubjects (not being a jeſuit, ſeminary prieſt, deacon, or religious or eccleſiaſtical perſon) be brought up in any college or ſeminary beyond ſea, ſhall not return within ſix months after proclamation in *London*, and within two days after his return before the biſhop of the dioceſe, or two juſtices of the peace ſubmit to her majeſty's laws, and take the oath of ſupremacy, then ſuch perſon, who ſhall otherwiſe return into this realm or other the queen's dominions, ſhall be adjudged a traitor.

" Sending relief to any jeſuit, ſeminary prieſt, or college of prieſts or jeſuits beyond the ſeas, or to one not returning out of ſuch college into *England*, ſhall incur a *præmunire*.

" Every offenſe againſt this act ſhall be tried in the king's bench in the county where it ſits, or in any other county, where the offenſe was committed, or offender apprehended.

" If a jeſuit, ſeminary prieſt, *&c.* within three days after his arrival in the queen's dominions ſubmit to ſome arch-

" biſhop,

" biſhop, biſhop, or juſtice of peace, and take the oath of " ſupremacy, and by writing under his hand profeſs to con- " tinue obedient to the laws, then he ſhall not be ſubject to " any penalty.

" Trial of peers in the caſe of treaſon, felony, or *præmu-* " *nire* to be by peers.

" Any perſon knowing ſuch prieſt to be within the realm " contrary to this act, and not diſcovering it to a juſtice of " peace, *&c.* within twelve days, ſhall be fined and impri- " ſoned during the queen's pleaſure, and a juſtice of peace " to whom ſuch diſcovery is made, not informing one of " the privy council, *&c.* ſhall forfeit two hundred marks.

29 *Eliz. cap.* 2. " No attainder of treaſon that now is, " where the party is executed, ſhall be reverſed for error.

23 *Eliz. cap.* 2. " A ſuſpected jeſuit or prieſt refuſing to " anſwer directly upon his examination ſhall be impriſoned " for his contempt, until he ſhall make direct anſwer.

And theſe are all the acts concerning treaſon in the queen's time, that I remember, except particular acts of attainder, whereof ſome are temporal, ſome perpetual.

In the time of king *James*, beſides the particular acts touching the treaſon of the conſpirators of the powder-plot, and the treaſons of the lords *Cobham* and *Gray*, there are ſome general clauſes touching treaſon in the ſtatutes of 3 *Jac. cap.* 4. (*g*), and 5. and among them this ſpecial clauſe which enlarged the ſtatute of 23 *Eliz. cap.* 1. *viz.*

" If any perſon ſhall upon or beyond the ſeas, or in any " other place within the dominions of the king, his heirs or " ſucceſſors, put in practice to abſolve, perſwade or with- " draw any of the king's ſubjects from their natural obedi- " ence to his majeſty, his heirs or ſucceſſors, or to reconcile " them to the pope or ſee of *Rome*, or to move any of " them to promiſe obedience to any pretended authority of " the ſee of *Rome*, or any other prince, ſtate or potentate, " then ſuch perſons, their procurers, counſellors and aiders, " and maintainers knowing the ſame ſhall be adjudged trai-

(*g*) The oath of allegeance appointed to the ſaid oath, are abrogated by 1 *W.* hereby, and this ſtatute ſo far as relates *& M. cap.* 8.

" tors, and likewiſe the perſons willingly abſolved or with-
" drawn, *&c.* their aiders, abetters, maintainers, *&c.* know-
" ing the ſame ſhall be adjudged traitors, to be indicted
" and proceeded againſt in any county where taken, as if
" the offenſe were committed in that county.

This act is much more ſtrictly pend againſt ſuch offenders, than the ſtatute of 23 *Eliz. cap.* 1. 1. It extends larger as to the place of ſuch offenſe. 2. The words (*to that intent*) which bound up the ſtatute of 23 *Eliz.* more ſtrictly, are here omitted. 3. The diſjunctive clauſes in this ſtatute have a greater latitude. 4. It extends to maintainers of the offenders knowing the ſame.

Neither do I find any ſpecial new act generally touching treaſon from this time till the 13th year of king *Charles* II.

13 *Car.* 2. *cap.* 1.

1. " If any perſon after 24 *June* 1661. during the king's
" life ſhall within the realm or without compaſs, imagine,
" invent, deviſe, or intend death or deſtruction, or any
" bodily harm tending to death or deſtruction, maim,
" wounding, impriſonment, or reſtraint of the perſon of
" the king, or to deprive or depoſe him from the ſtyle,
" honour, or kingly name of the imperial crown of this
" realm, or of any other his majeſty's dominions or coun-
" tries, or to levy war againſt his majeſty within the realm
" or without, or to move or ſtir up any foreiner to invade
" this realm, or any other his majeſty's dominions being un-
" der his majeſty's obeyſance, and ſuch compaſſings, imagina-
" tions, inventions, devices, or intentions, or any of them ſhall
" expreſs, utter, or declare by any printing, writing, preaching,
" or malicious and adviſed ſpeaking, being legally convicted
" thereof upon the oath of two lawful and credible witneſſes
" upon trial, or otherwiſe convicted or attainted by due
" courſe of law, then every ſuch perſon ſhall be deemed a
" traitor, and ſuffer and forfeit as in caſes of high treaſon.

2. If any after 24 *June* 1661. during his majeſty's life
" ſhall maliciouſly and adviſedly publiſh or affirm, that the
" king is an heretic or papiſt, or endeavours to introduce po-
" pery, or maliciouſly and adviſedly by writing or ſpeaking
" ſhall

" ſhall expreſs, publiſh, utter or declare any words or things " to incite the people to hatred or diſlike of his majeſty or " the eſtabliſhed government, ſhall be diſabled to enjoy any " office or promotion eccleſiaſtical, civil, or military, or other " employment, than that of peerage, and ſuffer ſuch farther " puniſhment as may be by law inflicted.

3. " Any that ſhall maliciouſly and adviſedly affirm the " parliament of 3 *Nov.* 1640. is yet in being, or that there " lies obligation upon any by any oath, engagement or cove- " nant to endeavour a change of government in church or " ſtate, or that both or either houſe of parliament have a " legiſlative power without the king, ſhall incur the penalty " of a *præmunire* 16 *R.* 2.

4. " No perſon to be proſecuted for any of the ſaid of- " fenſes, except treaſon, but by order of the king under his " ſign manual, or of the council, nor unleſs proſecuted within " ſix months after the offenſe, and indicted within three " months after proſecution.

5. " None to be indicted, arraigned, convicted, or con- " demned of any of the ſaid offenſes, unleſs the offender be " accuſed by two lawful and credible witneſſes upon oath, " which witneſſes upon his arraignment ſhall be brought in " perſon before the offender face to face, and maintain upon " oath what they have to ſay againſt him, unleſs the party " arraigned ſhall willingly without violence confeſs the ſame.

6. " This ſhall not deprive members of parliament of their " free debates.

" Trial by peers: peer convicted diſabled to ſit in parlia- " ment till his majeſty pardon him. (*b*)

(*b*) The acts relating to treaſon and offenſes of that nature, which have paſſed ſince our author wrote, may be reduced to theſe three heads: 1. Such as more immediately relate to the king and his government. 2. Such as relate to the coin. 3. Such as relate to the manner of trials and other proceedings.

1. As to the firſt, ſuch as relate to the king and his government.

By 9 *W.* 3. *cap.* 1. " If any of the " king's ſubjects, who have voluntarily " gone into *France*, or any the *French* " king's dominions in *Europe* before 11 " *Dec.* 1688. without licence from the " king or queen, or who have at any " time during the late war with *France* " born arms in the ſervice of the *French* " king, or who have ſince the 13 *Fe-* " *bruary* 1688. been in arms under the " command or in the ſervice of the " late king *James* in *Europe*, ſhall " return into this kingdom of *England*, " or any other the king's dominions " without licence from the king under " the privy ſeal, ſuch perſon ſhall be ad- " judged guilty of high treaſon. Where " the offenſe ſhall be committed out of " the realm, it may be tried in any " county.

Upon

Upon this act theſe things are obſervable,

1. That this act doth enact ſome treaſons, which certainly were ſo by 25 *E.* 3. as bearing arms in the ſervice of the *French* king during the war with *France*, which is plainly an adhering to the king's enemies; and tho 25 *E.* 3. ſays *adhering to the king's enemies in the realm*, yet it immediately adds *giving them aid and comfort in his realm or elſewhere*, *Co. P. C. p.* 11. *Vaughan's* caſe, 2 *Salk.* 635. indeed all the treaſons by this act are compounded of this old treaſon, altho they be new in form for the ſake of facilitating the proof in ſome inſtances, *Hil.* 2 *Ann. Boucher's* caſe, *State Tr. Vol.* V. *p.* 511.

2. That a pardon under the great ſeal (after having been in the ſervice of the *French* king and before returning) of all treaſons, &c. will not amount to a licence to return, becauſe it is the returning, which is the treaſon puniſhable by this act. 3 *Ann. Lindſay's* caſe, *State Tr. Vol.* V. *p.* 528.

3. That a *Scotchman* going out of *Scotland* into *France* (eſpecially if formerly reſident in *England*) after the time mentiond in the act, and returning into *England* is within the words and meaning of the act, even tho he had a licence to return into *Scotland*. *Ibid.*

4. That a perſon offending againſt this act by returning into *England* may be indicted in any county, where he is taken, altho it be not the firſt *Engliſh* county into which he came. *Ibid.*

5. That this act is perpetual and extends to the king's ſucceſſors, altho the act ſpeak only of the king generally and not of his ſucceſſors, according to the reſolution 12 *Co. Rep.* 109. *vide ſupra p.* 100.

By 13 & 14 *W.* 3. *cap.* 3. "The pre-
" tended prince of *Wales* is attainted of
" high treaſon, and it is made high
" treaſon for any of the king's ſubjects
" by letters, meſſages or otherwiſe to
" hold correſpondence with him or any
" perſon employed by him, or to remit
" any money for his uſe knowing the
" ſame. Provides that offenſes againſt
" this act committed out of the realm
" may be tried in any county.

By 1 *Ann. cap.* 17. "It is made high
" treaſon to attempt by overt-act or deed
" to deprive or hinder any perſon next
" in ſucceſſion to the crown (according
" to the limitation of the crown by 1 *W.*
" & *M. ſeſſ.* 2. *cap.* 2. and 12 *W.* 3. *cap.* 2.)
" from ſucceeding after the deceaſe of
" the queen; but this ſucceſſion has
" now happily taken place, and thereby
" put an end to this ſtatute.

By 3 & 4 *Ann. cap.* 14. "If any ſub-
" ject, who has voluntarily gone into
" *France* ſince 4 *May* 1702. or into any
" the *French* king's dominions in *Eu-*
" *rope* without licence from the queen,
" or has ſince the ſaid 4 *May* born arms
" in the ſervice of the *French* king,
" ſhall return into *England* without li-
" cence from the queen under her privy
" ſeal, he ſhall be adjudged guilty of
" high treaſon.

By 4 *Ann. cap.* 8. "It is made high
" treaſon for any one maliciouſly to af-
" firm by writing or printing, that the
" pretended prince of *Wales*, or any o-
" ther perſon hath any right to the
" crown of theſe realms, other than ac-
" cording to 1 *W.* & *M.* and 12 *W.* 3.
" or that the kings of *England* are not
" able by authority of parliament to
" make laws to bind the deſcent, limi-
" tation, inheritance and government of
" the crown. To declare the ſame things
" by preaching, teaching or adviſed
" ſpeaking is made a *præmunire*.

This act (which is in the main tranſcribed from 13 *Eliz. cap.* 1.) was re-enacted upon occaſion of the union 6 *Ann. cap.* 7. Upon this ſtatute *Matthews* the printer was convicted and executed for printing a pamphlet intituled, *Vox Populi Vox Dei*, *October* 30. 1719. at the *Old Baily*.

By 7 *Ann. cap.* 4. "It is high treaſon
" for any officer of the army or ſoldier
" by land or ſea to hold correſpondence
" with any rebel or enemy to her ma-
" jeſty, or to treat with ſuch rebel or
" enemy without her majeſty's licence.

By 7 *Ann. cap.* 21. "Whatever is
" high treaſon or miſpriſion of treaſon
" in *England*, (and none elſe) ſhall be
" high treaſon or miſpriſion of treaſon
" in *Scotland*.

II. Such as relate to the coin.

By 8 & 9 *W.* 3. *cap.* 25. "Whoever
" ſhall knowingly make or mend, or aſ-
" ſiſt in making or mending, or ſhall
" buy or ſell, or have in his poſſeſſion
" any inſtruments proper for the coinage
" of money, or convey ſuch inſtruments
" out of the king's mint, or ſhall mark
" on the edges any coin current or di-
" miniſhed coin of the kingdom, or any
" counterfeit coin reſembling the coin of

" the kingdom with letters or other " marks like to thoſe on the edges of " money coined in the king's mint, or " ſhall colour, gild or caſe over any " coin reſembling the current coin of " the kingdom, or any round blanks of " baſe metal, *&c.* ſhall be guilty of high " treaſon. No attainder by this act ſhall " work corruption of blood or loſs of dow- " er, nor proſecution be for any offenſe " againſt the ſame, unleſs commenced " within three months after the offenſe " committed:" this act was but temporary.

But by 7 *Ann. cap.* 25. it is made perpetual, and the time of proſecution enlarged from three months to ſix months after the offenſe committed.

III. Such as relate to the manner of trials and other proceedings.

By 7 *W.* 3. *cap.* 3. " Every perſon in- " dicted for high treaſon, whereby cor- " ruption of blood may be made, ſhall " have a true copy of the whole indict- " ment, but not the names of the wit- " neſſes, delivered to him five days be- " fore his trial, paying for it not exceed- " ing five ſhillings, and ſhall be admit- " ted to make his defenſe by counſel, " and witneſſes on oath, the ſaid coun- " ſel not to exceed two, and to be aſ- " ſigned by the court, and to have ac- " ceſs to the priſoner at all ſeaſonable " times.

" No perſon ſhall be indicted, tried, " or attainted but on the oaths of two " lawful witneſſes, which two witneſſes " muſt be to the ſame treaſon," altho it be not neceſſary they ſhould both be to the ſame overt-act.

" No proſecution to be for any ſuch " treaſon unleſs the party be indicted " within three years after the offenſe " committed, unleſs it be for a deſign " or attempt to aſſaſſinate the king by " poiſon or otherwiſe.

" The priſoner ſhall have a copy of " the pannel of the jurors two days be- " fore his trial, and ſhall have like pro- " ceſs to compel the appearance of wit- " neſſes for him, as is uſually granted for " witneſſes againſt him.

" No evidence ſhall be given of any " overt-act not expreſly laid in the in- " dictment.

" No indictment, proceſs, *&c.* ſhall " be quaſhed for miſ-writing, miſ ſpel- " ling, falſe or improper *Latin*, unleſs " exception be taken in court before " any evidence given upon ſuch indict- " ment, nor ſhall any ſuch miſ-writing, " *&c.* be cauſe to ſtay judgment after " conviction, but ſuch judgment may ne- " verthleſs be reverſed upon writ of er- " ror, as before the making this act.

" In the trial of a peer or peereſs all " peers intitled to vote in parliament " ſhall be ſummoned twenty days be- " fore the trial, and every one ſo " ſummoned and appearing ſhall vote " at ſuch trial, firſt taking the oaths to " the government, *&c.*

" Provided that this act ſhall not " extend to impeachments or other pro- " ceedings in parliament, nor to indict- " ments of high treaſon, nor any pro- " ceedings thereupon for counterfeiting " his majeſty's coin, great ſeal, privy " ſeal, ſign manual, or privy ſignet.

By 1 *Ann. cap.* 9. " In any trial for " treaſon or felony the witneſſes for the " priſoner ſhall be upon oath.

By 7 *Ann. cap.* 21. " After the deceaſe " of the preſent pretender no attainder " of treaſon ſhall work a diſheriſon of " the heir, nor affect any other right, " ſave that of the offender for his natu- " ral life only, and every perſon indicted " for high treaſon or miſpriſion of trea- " ſon ſhall have a liſt of the witneſſes " to be produced againſt him on his " trial, and of the jury, mentioning the " places of their abode, *&c.* given to " him together with the copy of the " indictment ten days before his trial " in the preſence of two credible wit- " neſſes.

CHAP. XXVI.

Concerning the judgments in high treason *and the particulars relating thereunto, and to* attainders.

THIS Chapter divides itself into these particulars: 1. Touching the person against whom the judgment is to be given. 2. By whom it is to be given. 3. What the form of the judgment is. 4. What the consequents thereof are.

I. Touching the person, against whom a judgment in treason is to be given.

In antient time, if a man had been slain in open war against the king either in rebellion, or adhering to the king's enemies, the king did *de facto* take a forfeiture, sometimes by presentment in *Eyre*, sometimes by presentment in the king's bench, and sometimes by inquisition by the eschetor: for this see the whole pleading in the chancery, *Claus.* 29 E. 3. *M.* 2. & 4. for the coheirs of *Robert de Ross* for the manor of *Werk*.

But in all other cases, whether of felony or treason, if the party had died before attainder, tho he were kild in the pursuit, *Claus.* 26 E. 3. *m.* 29. *pro Ricardo filio Ade Peschall*; and *H.* 16 E. 1. *Rot.* 27. *coram rege. Sussex, pro Stephano Northup'* (*a*) *M.* 20 & 21 E. 1. *Rot.* 4. *in dors. coram rege pro Johanne de*

(*a*) That case was thus: *Richard de Northup' de Estdene* killed *Endo de Shelfhangre* in the reign of *Henry* III. for which murder he was indicted and outlawed upon an exigent awarded against him by the justices itinerant in *Sussex anno* 55 *H.* 3. whereupon his lands were seised, afterwards, *viz. H.* 16 E. 1. *Stephen*, brother and heir of the said *Richard Northup'*, impleaded the chief lord of the fee *coram rege* for his said brother's lands, and alleged, *quod prædictus* Ricardus *obiit ante iter prædictorum justiciariorum, & quod post mortem suam positus fuit in exigendis*; upon which point the parties joined issue, and in the following *Easter*-term *anno* 16 *Edw.* 1. *venerunt juratores, qui dicunt super sacramentum suum, quod prædictus* Ricardus Northup' de Estdene *obiit apud* Rotherfield *in comitatu prædicto ante prædictum iter prædictorum*

de Bekingham (*b*), or tho he died after conviction and before judgment, 7 *H.* 4. 27. *a.* there enſued neither attainder nor forfeiture of lands.

But the law was practiſed antiently, and it ſeems continuing to this day, if a traitor or a felon reſcue himſelf, or will not ſubmit to be arreſted and on reſiſtance is ſlain, upon preſentment thereof he ſhall forfeit his goods and chattles, 3 *E.* 3. *Corone* 290, 312. *Co. P. C. p.* 227. for if a perſon be arraigned for felony or treaſon, tho he be acquitted, yet if it be found he fled, he forfeits his goods, and this is but in nature of a preſentment of *fugam fecit.*

But whether that preſentment be traverſable, *vide Stamf. P. C. Lib.* III. *cap.* 21. (*c*)

Yet the former practice by degrees grew out of uſe, for in 8 *E.* 3. 20. *a.* the judges would not allow an averment, that a party died in rebellion or adhering to the king's enemies, without a record of his conviction, for it is poſſible he might be there againſt his will.

But now by the ſtatute of 25 *E.* 3. *de proditionibus*, which requires an attainder by conviction and attainder *per gents de lour condition*, that attainder after death for adhering to the king's enemies is ouſted.

And becauſe it might be ſaid, that an inqueſt before the eſchetor might ſatisfy thoſe words, the ſtatute of 34 *E.* 3. *cap.* 12.

rum juſtitiariorum: Et ideo conſideratum eſt, quod prædictus Stephanus *recuperet ſeiſinam ſuam de prædictis terris, &c.*

(*b*) This was in the county of *Nottingham*; *Alan de Bekingham* was appeald by *Eve* the wife of *Peter de Dyvyngton' de morte prædicti viri ſui* before ſpecial commiſſioners of *oyer* and *terminer*, upon which the ſaid *Alan* was brought before them, and pleaded *ſe clericum eſſe, & non alibi quam in foro eccleſiaſtico inde poſſe aut debere reſpondere*; and thereupon the ſaid juſtices proceeded *ex officio de morte prædicta inquiſitionem capere, & ipſum* Alanum *per inquiſitionem illam culpabilem inde invenerunt, & talem ipſum priſonæ regis de* Nottingham *occaſione mortis prædictæ reponi præceperunt: Alan* died in priſon, and after his death the ſheriff and coroners ſeiſed all his lands and tenements into the king's hands, *ac ſi idem* Alanus *de morte prædicta convictus fuiſſet & judicium propter hoc ſubiiſſet*; but upon a *monſtravit* of *John*, ſon and heir of the ſaid *Alan*, the matter came to be heard *coram rege*, and thereupon in *Trinity*-term following, *anno* 21 *Ed.* 1.

" Rex ex gratia ſua concedit, quod præ-
" dictus *Johannes* filius *Alani de Be-*
" *kingham* habeat ſeiſinam de tenemen-
" tis in manu domini regis exiſtentibus,
" ſalvo jure ſuo & hæredum ſuorum &
" aliorum, cum inde loqui voluerint,
" &c. Et ideo præceptum eſt vicecomi-
" miti, quod habere faciat prædicto *Jo-*
" *hanni* ſeiſinam de prædictis tenemen-
" tis in forma prædicta cum pertinen-
" tiis, &c.

(*c*) *fol.* 183. *b.*

cap. 12. hath in expreſs terms for the future ouſted ſuch attainders or convictions after the parties death, at leaſt in other caſes than forfeitures of war, and except forfeitures of old times judged after the parties death by preſentment in *Eyre*, or in the king's bench, as of felons of themſelves; and therefore *Jack Cade*, who was ſlain in open rebellion, could not be attaint but by act of parliament, and ſo it is recited in the act of his attainder 29 *H.* 6. *cap.* 1.

Yet after the ſtatute of 34 *E.* 3. the earl of *Salisbury* and others, who conſpired againſt *Henry* IV. and levied war againſt him, and in their flight were taken, had their heads ſtricken off by thoſe, that apprehended them, without any judgment given againſt them, and after their death judgment of treaſon was given againſt them by the king and lords in parliament, *Rot. Par.* 2 *H.* 4. *n.* 30. upon which the heir of the earl of *Salisbury* brought a petition of error, *Rot. Par.* 2 *H.* 5. *part.* 1. *m.* 13. and aſſigned for error among other errors, that his anceſtor was dead at the time of the judgment given in parliament, but yet the judgment was affirmed; yet afterwards *Rot. Par.* 9 *H.* 5. *n.* 19. to avoid all queſtions he was reſtored by act of parliament.

Again, no man ought to be attainted of treaſon without being called to make his defenſe and put to anſwer, which is called *arrenatio* or *ad rationem poſitus*.

Clauſ. 1 *E.* 3. *part.* 1. *m.* 21. *dorſ. Thomas* earl of *Lancaſter* was condemned to death, as a traitor by *Edward* II. at *Pontefract*, *Henry* his brother brought a petition of error in the parliament of 1 *E.* 3. upon that judgment, the record was removed in theſe words.

" Placita coronæ coram domino *Edwardo* rege filio domini
" regis *Edwardi* tenta in præſentiâ ipſius domini regis apud
" Pontem-fractum die lunæ proximè ante feſtum annuncia-
" tionis beatæ *Mariæ* virginis anno regni ſui quintodecimo.

" Cum *Thomas* comes *Lancaſtriæ* captus pro proditionibus,
" homicidiis, incendiis, depredationibus, & aliis diverſis feloniis
" ductus eſſet coram ipſo domino rege, præſentibus *Edmundo*
" comite *Kant'*, *Johanne* comite *Richemund'*, *Adomaro* de *Valen-*
" *ciâ* comite *Pembroch'*, *Johanne* de *Warennâ* com' *Surr'*, *Ed-*
" *mundo*

" *mundo* com' *Arundell'*, *David* com' *Athol*, *Roberto* comite de
" *Anegos*, baronibus & aliis magnatibus regni, dominus rex
" recordatur, quod idem *Thomas* homo ligeus ipſius domini
" regis venit apud *Burton* ſuper *Trentam* ſimul cum *Humfr'o*
" *de Bohun* nuper com' *Hereſ'*, proditore regis & regni in-
" vento cum vexillis explicatis apud *Pontem Burgi* in bello
" contra dominum regem, & ibidem interfecto, & *Rogero*
" *Damory* proditore adjudicato, & quibuſdam aliis proditori-
" bus & inimicis regis & regni cum vexillis explicatis, & ut de
" guerrâ hoſtiliter reſiſtebat & impedivit ipſum dominum re-
" gem & homines & familiares ſuos per tres dies continuos,
" quo minus pontem dictæ villæ de *Burton* tranſire potue-
" runt, &c.---Et unde dominus rex, habito reſpectu ad tanta
" dicti *Thomæ* comitis facinora, & iniquitates ejus, & ejus
" maximam ingratitudinem, nullam habuit cauſam ad aliquam
" gratiam eidem *Thomæ* comiti de pœnis prædictis ſuper ip-
" ſum adjudicatis pardonand' in præmiſſis faciend', quia ta-
" men idem *Thomas* comes de parentelâ excellenti & nobiliſ-
" ſimâ procreatus eſt, dominus rex ob reverentiam dictæ pa-
" rentelæ remittit de gratiâ ſuâ ſpeciali prædicto *Thomæ* co-
" miti executionem duarum pœnarum adjudicatarum, ſicut
" prædictum eſt, ſcilicet quod idem *Thomas* comes non tra-
" hatur, neque ſuſpendatur, ſed quod executio tantummodo
" fiat ſuper ipſum *Thomam* comitem, quod decapitetur.

" Thereupon the record being read in præſentiâ domini re-
" gis, procerum & magnatum regni & aliorum in hoc parlia-
" mento, he aſſigned theſe errors: 1. Quòd erratum eſt in hoc,
" quòd cùm quicunque homo ligeus domini regis pro ſeditioni-
" bus, homicidiis, robberiis, incendiis & aliis feloniis tempore pa-
" cis captus, & in quâcunque curia regis ductus fuerit, de hu-
" juſmodi ſeditionibus & aliis feloniis ſibi impoſitis, per legem
" & conſuetudinem regni arrenari debet, & ad reſponſionem
" poni, & inde per legem &c. convinci, antequam fuerit
" morti adjudicatus; licet prædictus *Thomas* comes, homo li-
" geus prædicti domini regis patris, &c. tempore pacis cap-
" tus, & coram ipſo rege ductus fuit, dictus dominus rex pa-
" ter, &c. recordabatur ipſum *Thomam* eſſe culpabilem de ſe-
" ditionibus & feloniis in prædictis recordo & proceſſu con-

" tentis, abſque hoc, quod ipſum inde arrenavit ſeu ad re-
" ſponſionem poſuit, prout moris eſt ſecundum legem, &c.
" & ſic abſque arrenamento & reſponſione idem *Thomas* erro-
" nicè, & contra legem terræ tempore pacis morti extitit adju-
" dicatus, unde cum notorium ſit & manifeſtum, quod totum
" tempus, quo impoſitum fuit eidem comiti prædicta mala &
" facinora in prædictis recordo & proceſſu contenta feciſſe,
" & etiam tempus, quo captus fuit, & quo dictus dominus
" rex pater recordabatur ipſum eſſe culpabilem, &c. & quo
" morti extitit adjudicatus, fuit tempus pacis, maximè cum
" per totum tempus prædictum cancellaria & aliæ placeæ cu-
" riæ domini regis apertæ fuerunt, & in quibus lex cuicun-
" que fiebat, prout fieri conſuevit, nec idem dominus rex
" unquam in tempore illo cum vexillis explicatis equitabat,
" prædictus dominus rex pater, &c. in hujuſmodi tempore
" pacis contra ipſum comitem ſic recordari non debuit, nec
" ipſum ſine arrenamento & reſponſione morti adjudicaſſe.
" Dicit etiam, 2. Quod erratum eſt in hoc, quod cum
" prædictus *Thomas* comes fuiſſet unus parium & magna-
" tum regni, & in Magnâ Cartâ de libertatibus *Angliæ* con-
" tineatur, *quod nullus liber homo capiatur, impriſonetur, aut*
" *diſſeiſiatur de libero tenemento ſuo, vel libertatibus, ſeu li-*
" *beris conſuetudinibus ſuis, aut utlegetur, aut exulet, nec a-*
" *liquo modo deſtruatur, nec dominus rex ſuper eum ibit, nec*
" *ſuper eum mittet, niſi per legale judicium parium ſuorum,*
" *vel per legem terræ*, prædictus *Thomas* comes per recordum
" regis, ut prædictum eſt, tempore pacis erronicè morti fuit
" adjudicatus abſque arrenamento ſeu reſponſione, ſeu le-
" gali judicio parium ſuorum, contra legem, &c. & con-
" tra tenorem Magnæ Cartæ prædictæ: and therefore, as
" brother and heir of *Thomas*, prays, that the judgment
" be annulled, and he reſtored to his inheritance, & quia
" inſpectis & plenius intellectis recordo & proceſſu præ-
" dictis, &c. ob errores prædictos & alios in eiſdem re-
" cordo & proceſſu compertos conſideratum eſt per ipſum
" dominum regem, proceres, magnates & totam communi-
" tatem regni in eodem parliamento, quod prædictum judi-
" cium contra prædictum *Thomam* comitem redditum, tan-

" quam

" quam erroneum, revocetur & adnullettur, & quod præ-
" dictus *Henricus*, ut frater & hæres ejuſdem *Thomæ* comitis,
" ad hæreditatem ſuam petendam & habend' debito proceſſu
" inde faciend', prout moris eſt, admittatur, & habeat brevia
" cancellariæ, & quod juſtic', in quorum placeis dicta recor-
" dum & proceſſus irrotulantur, eadem recordum & pro-
" ceſſus irritari faciunt & adnullari, &c. *P.* 15 *E.* 2. *B. R. Rot.* 69. *& Paſch.* 39 *E.* 3. *Rot.* 49. *coram Rege.*

This notable record, even before the ſtatute of 25 *E.* 3. gives us an account of theſe things: 1. That in time of peace no man ought to be adjudged to death for treaſon, or any other offenſe without being arraigned and put to anſwer. 2. That regularly, when the king's courts are open, it is a time of peace in judgment of law. 3. That no man ought to be ſentenced to death by the record of the king without his legal trial *per pares.* 4. That in this particular caſe the commons, as well as the king and lords, gave judgment of the reverſal.

John Matravers was attainted of treaſon in the parliament of 4 *E.* 3. *n.* 3. for the death of the earl of *Kent*, as hath been before ſhewn, *cap.* 11. *p.* 82. in his abſence, *Rot. Par.* 21 *E.* 3. *n.* 65. *dorſ.* the ſame *John Matravers* ſued in parliament to reverſe that judgment, and aſſigned for error, *qil eſt adjudge a mort in un parlement tenus a* Weſtminſter *en l'abſence de lui, nient indite, nient arrayne, ne appell a reſpons, countre le ley de realm & les uſages approves*; he did not prevail in that parliament but *Rot. Par.* 25 *E.* 3. *n.* 54 *&* 55. he had a reſtitution by the king confirmed in parliament.

Roger Mortimer earl of *March* was condemned for treaſon for the death of king *Edward* II. *Rot. Par.* 4 *E.* 3. *n.* 1. his couſin and heir *Roger Mortimer*, *Rot. Par.* 28 *E.* 3. *n.* 9 *&* 10. brought a petition of error upon that judgment, whereupon the record of his attainder was removed into parliament, and there entred of record, and errors aſſigned; the judgment of reverſal is thereupon given in this form.

" Les queux record & judgment lues & examine in plein
" parlement le dit *Roger* coſin & heyre de dit counte dit &
" alledge, qe les record & judgment ſuſdit ſont erroynes &

" defective

" defective in touts points, & noſment en tant come le dit " counte eſtoit myſe a mort & diſherite ſans nul accuſement " & ſans eſtre meſne en judgment, ou en reſpons, dont il " prie, qe les record & judgment avant dits ſoient revers & " adnulls, & ſur ceo ove bone deliberation ed aviſe ed grant " leiſure per noſtre dit ſeigneur le roy, prelates, prince, & " ducs, countes, & barons avant dit, il peirt clerement, qe " meſmes les judgment & records ſont erroynes & defectives " en touts points, par quoi noſtre dit ſeigneur le roy & les " dits prelates, prince, ducs, countes, & barons par accord " des chivalers des countes & des commons repellent, & " anyentiſſent, & pur erroyn & irrit adjuggent les records & " judgment ſuſdits," and reſtore *Roger* the petitioner to the title of earl of *March*, and to the lands, *&c.* of his grandfather.

But if the party accuſed declined his appearance, it is true then, that the law of the land is, that he ſhould be proceeded againſt to an outlawry, and may thereby be attainted by proceſs of outlawry without anſwer, for he declines it by his own default.

And ſometimes there was a more compendious way, namely, the iſſuing of a proclamation-writ to appear in a month, two, or three in the court of king's bench, or that in default thereof the party ſhould be attainted of treaſon or ſuch other offenſe, wherewith he was charged; and this was frequently done by act of parliament in particular caſes, not unlike the proceſs enacted in caſe of an aſſault upon a member of parliament by the ſtatute of 5 *H.* 4. *cap.* 6. and 11 *H.* 6. *cap.* 11.

Sometimes the lords houſe did make ſuch a direction, as in the caſe of *Talbot*, *Rot. Par.* 17 *R.* 2. mentiond before, *p.* 265. but it could not be effectual to attaint the party upon his default of appearance upon the return of proclamation without act of parliament, or proceſs of outlawry.

Again, as a man could not be attainted of treaſon without arraignment, if preſent, or proceſs of outlawry, if abſent, ſo neither could he be arraigned without an accuſation; and this accuſation was of three kinds: 1. If he were taken with the *mainouer*. 2. By way of appeal. 3. By way of indictment.

1. In antient time, ſometimes as well in caſe of treaſon, as in caſe of felony a man, that was taken *cum manu opere*, was thereupon arraigned, an inſtance we have thereof, *T.* 10 *E.* 2. *Rot.* 132. *Bucks* cited before *p.* 186.

But this is wholly diſuſed and ouſted by the ſtatutes of 5 *E.* 3. *cap.* 9. and 25 *E.* 3. *cap.* 4. by which ſtatutes none ſhall be put to anſwer without indictment or preſentment of good and lawful men of the neighbourhood.

2. By appeal, and this was uſual at common law, as appears by *Britton*, *cap.* 22. but this kind of proceeding by appeal in the king's ordinary courts in caſes of treaſon hath been long diſuſed, and it ſeems is wholly taken away by the ſtatutes of 5 and 25 *E.* 3. above-mentiond.

But yet notwithſtanding that courſe of appeal continued ſtill in parliament, as appears by ſeveral inſtances, eſpecially in the great appeal of treaſon by the lords appellants in 11 and 21 *R.* 2. (*d*), but by the ſtatute of 1 *H.* 4. *cap.* 14. all appeals in parliament are wholly taken away, and accordingly upon reference to the judges upon the impeachment made in the lord's houſe by the earl of *Briſtol* againſt the earl of *Clarendon* in the preſent parliament, it was reſolved and reported by all the judges. (*e*)

But yet that ſtatute hath not taken away impeachments by the houſe of commons in caſes of treaſon or other miſdemeanors, and therefore tho ſince 1 *H.* 4. *cap.* 14. all appeals of treaſon by particular perſons are taken away, and have been wholly diſuſed, yet impeachments by the commons have been ever ſince very frequently uſed, becauſe they are rather in the nature of grand indictments, than appeals.

3. By way of indictment, this is the regular and legal way of proceeding in caſe of treaſon.

And thus far for the perſons againſt whom judgment of treaſon may be given, and the manner of deducing them unto judgment.

II. As touching the perſons, by whom judgment of treaſon may be given; this concerns more eſpecially the juriſdiction of courts: a word touching it.

(*d*) *State Tr. Vol.* I. *p.* 4.

(*e*) *State Tr. Vol.* II. *p.* 552.

1. Juſtices of peace cannot regularly arraign, try or give judgment in caſe of treaſon, unleſs in ſuch caſes, as are by ſpecial act of parliament committed to their cognizance, as 26 *H.* 8. *cap.* 6. 5 *Eliz. cap.* 1. 13 *Eliz. cap.* 2. 23 *Eliz. cap.* 1. and ſome others, becauſe their commiſſion extends not to it, yet they may take examinations touching treaſon in order to the diſcovery thereof and preſervation of the peace.

2. Juſtices of *oyer* and *terminer* may give judgment in caſe of high treaſon, for it is expreſly within their commiſſion.

3. Juſtices of gaol-delivery may give judgment in caſe of treaſon on any perſon in priſon before them, and that is proved by the ſtatute of 1 *E.* 6. *cap.* 7. and by the conſtant practice.

4. Juſtices of *Niſi prius* may give judgment in caſe of treaſon by the ſtatute of 14 *H.* 6. *cap.* 1. but *quære*, whether it be barely by force of that commiſſion, or whether it muſt be by virtue of ſome other commiſſion.

5. Juſtices of the king's bench in the court of king's bench may give judgment in caſe of treaſon, for it is the higheſt court of ordinary juſtice, eſpecially in criminals.

6. If a peer be indicted and plead not guilty to his indictment, and is tried by his peers and found guilty, the lord ſteward commiſſionated by the king for that office gives the judgment, and orders execution.

7. If a peer be tried in parliament by the lords, they uſually elect a perſon to be lord ſteward to gather up their votes and pronounce the judgment, but for the moſt part that ſteward ſo elected, tho in parliament, is commiſſionated by the king under his great ſeal; but of this more hereafter.

III. I come to the form of the judgment.

The judgments in caſe of treaſon are of two kinds, *viz.* the ſolemn and ſevere judgment, and the leſs.

The ſolemn or ſevere judgment againſt a man convict of high treaſon is ſet down, *Co. P. C. p.* 210. *Stamf. Lib.* III. *cap.* 19. (*f*), 1 *H.* 7. 24. *a. Stafford's* caſe *& alibi*, "Et ſuper "hoc viſis & per curiam hic intellectis omnibus & ſingulis "præmiſſis conſideratum eſt, 1. Quod prædictus *R.* uſque fur-"cas

1

(*f*) *p.* 182. *a.*

" cas *T.* trahatur. 2. Ibidem ſuſpendatur per collum, & vi-
" vus ad terram proſternatur. 3. Interiora ſua extra ven-
" trem ſuum capiantur. 4. Ipſoque vivente (g) comburantur,
" & 5. Caput ſuum amputetur. 6. Quodque corpus ſuum
" in quatuor partes dividatur. 7. Et quod caput & quarteria
" illa ponantur, ubi dominus rex ea aſſignare voluerit.

The king may and often doth diſcharge or pardon all the puniſhment, except beheading, and in as much as that is part of this judgment, it may be executed by the king's ſpecial command, tho the reſt be omitted.

In the caſe of a woman her judgment is to be drawn and burnt, as well in high treaſon, as petit treaſon, and ſhe is neither hanged nor beheaded.

The leſs ſolemn judgment is only *to be drawn and hanged*, and this is regularly the judgment in caſe of counterfeiting the coin of this kingdom, for that was the judgment in that caſe at common law, which was not altered by the ſtatute of 25 *E.* 3. *viz.* " Super quo viſis, &c. conſideratum eſt, quod *B.*
" uſque furcas de *T.* trahatur, & ibidem ſuſpendatur per col-
" lum, quouſque mortuus fuerit.

But the judgment in that caſe alſo for a woman is to be drawn and burnt, 25 *E.* 3. 85. *b.*

And it ſeems the ſame judgment was alſo for importing counterfeit coin, and yet that was not treaſon at common law.

And the ſame judgment was for counterfeiting the great or privy ſeal at common law, as may be eaſily gathered out of *Bracton, Lib.* III. *de Corona, cap.* 3. but expreſly by *Fleta, Lib.* I. *cap.* 22. *Crimen falſi dicitur, cum quis accuſatus fuerit, quod ſigillum regis, vel appellatus, quod ſigillum domini ſui de curia ſua familiâ fuerit, falſaverit, & brevia inde conſignaverit, vel cartam aliquam vel literam ad exheredationem domini vel alterius damnum ſic ſigillaverit, & quibus caſibus, ſi quis inde convictus fuerit, detractari meruit & ſuſpendi.*

And accordingly the like judgment hath been given, as in caſe of petit treaſon, for counterfeiting the great ſeal after the

(g) Theſe words are ſo material, that the judgment was reverſed for want of them in the caſe of *Walcot*, 33 *Car.* 2. *Show. Ca. Parl.* 227. 1 *Salk.* 632.

the ſtatute of 25 *E.* 3. as appears by 2 *H.* 4. 25. and the record is accordingly (*b*); and tho it is true my lord *Coke* ſaith, it is a miſtake *Co. P. C. p.* 15. yet I rather think it was a miſtake in my lord *Coke*, and that the judgment may be given either way, *viz. diſtrahatur & ſuſpendatur*, or *diſtrahatur, ſuſpendatur & decapitetur.*

In the caſe (*i*) 16 *Jac.* for counterfeiting the privy ſignet, which was made treaſon by the ſtatute of 1 *Mar. cap.* 6. the judgment was the great and ſolemn judgment of drawing, hanging and quartering.

But ſuppoſe the judgment were ſo in caſe of counterfeiting the ſeal, great or privy, yet the queſtion is whether the ſame judgment muſt be in thoſe new treaſons enacted by 1 & 2 *P. & M. cap* 11. for counterfeiting forein coin made current by proclamation, and alſo upon the ſtatutes of 5 *Eliz.* and 18 *Eliz.* for clipping and waſhing, whether muſt they have the ſolemn judgment to be hanged and quartered, or only the judgment of petit treaſon to be drawn and hanged.

And herein by *Stamf. Lib.* III. *cap.* 19. (*k*), and *Co. P. C. p.* 17. the judgment is to be the ſolemn judgment, and not the judgment to be drawn and hanged, becauſe it is a new treaſon made by act of parliament, and therefore muſt have the ſolemnity of the great judgment in caſe of high treaſon.

And ſurely this is regularly true, and therefore in the caſe of popiſh prieſts, and thoſe other acts of treaſon newly enacted in the queen's time, the judgment is to be drawn, hanged and quartered; but it ſeems to me, that the law is otherwiſe in relation to thoſe new treaſons enacted in the time of queen *Mary* and queen *Elizabeth* relating to coin, and that in all thoſe caſes the judgment at leaſt may be only to be drawn and hanged; and my reaſons are, 1. Becauſe they are *in cognata materia falſificationis monetæ*, and therefore tho they are made treaſon, yet they are within the verge of the crime of falſification of money, and are to be under the ſame puniſhment. 2. It were unreaſonable to think, that the parliament ſhould make the counterfeiting of forein coin to have a greater kind of puniſhment, than the counterfeiting of the

coin

(*b*) *Vide ſupra in notis p.* 181. (*i*) *Robinſon's caſe*, 2 *Rol. Rep.* 50. (*k*) *p.* 181. *b.*

coin of this kingdom, or that clipping *Engliſh* or forein coin ſhould have a greater puniſhment, than counterfeiting of the coin of this kingdom. 3. As the ſtatute of 25 *E.* 3. tho it declare as well counterfeiting of money as levying of war to be high treaſon, yet leaves them under the ſeveral degrees of puniſhments proportionable to their nature, and what they had before, ſo tho theſe ſtatutes make thoſe to be new treaſons, that were not before, yet in as much as the puniſhments of treaſons were not equal, but that concerning coin was a puniſhment of a lower allay, therefore the ſubject matter of thoſe acts ſhall govern the degree of their puniſhment according to that puniſhment of treaſon, that relates to coin. 4. And accordingly in the book of *T.* 6 *Eliz. Dy.* 230. *b.* it is agreed by the juſtices, that the puniſhment *pro tonſurâ monetæ* is only to be drawn and hanged, and upon a ſtrict ſearch into the precedents of *Newgate* from 5 *Eliz.* downwards, tho ſome judgments for clipping be the ſolemn judgments, yet the moſt and lateſt are only to be drawn and hanged, and accordingly it was reſolved and done upon great deliberation lately in the king's bench upon the conviction of two *Frenchmen* for clipping of the king's coin. (*l*)

But however it ſeems, that the judgment either of one kind or the other ſeems not to be erroneous, for hanging and drawing is part of the ſolemn judgment, and tho either may be perchance warrantable enough, yet certainly the judgment of petit treaſon in all treaſons touching coin is the moſt warrantable and ſafe.

IV. I come to conſider of the conſequents of a judgment in treaſon.

If the judgment be given by him, that hath authority, and it be erroneous, it was at common law reverſible by writ of error; only the ſtatute of 29 *Eliz. cap.* 2. ſecures all former attainders, where the party is executed, from reverſal by writ of error, but meddles not with other attainders, neither doth the ſtatute of 33 *H.* 8. *cap.* 20. take away writs of error upon attainder of treaſon, as hath been reſolved againſt the opinion of *Stamf. P. C. Lib.* III. *cap.* 19. (*m*), *Co. P. C. p.* 31.

(*l*) The caſe of *Bellew* and *Norman*, *Raym.* 234. 1 *Ventr.* 254. (*m*) *p.* 189. *b.*

But it is true, that the ſtatutes of 26 *H.* 8. *cap.* 13. and 5 *&* 6 *E.* 6. *cap.* 11. take away from a perſon outlawed in treaſon the advantage of reverſal of an outlawry, *becauſe the party outlawed was out of the realm,* but extends not to other offenſes.

The conſequents of a judgment in treaſon are, 1. Corruption of blood of the party attaint. 2. Loſs of dower to his wife. 3. Forfeiture to the king of all his lands, goods and chattles. 4. Execution, whereof in the next chapter.

CHAP. XXVII.

Touching corruption of blood *and* reſtitutions *thereof,* loſs of dower, forfeiture *of goods, and* execution.

THE Conſequence of the judgment in high treaſon, petit treaſon, or felony, is corruption of blood of the party attaint; unleſs it be in ſuch ſpecial treaſons or felonies enacted by parliament, wherein it is eſpecially provided, that the attainder thereof ſhall make no corruption of blood, as upon the ſtatutes of 5 and 18 *Eliz.* in treaſon for clipping and waſhing of coin; and upon the ſtatutes of 21 *Jac. cap.* 26. for acknowledging a recognizance, *&c.* in another's name, 1 *Jac. cap.* 11. for bigamy, and many others.

If a man be attaint of piracy before commiſſioners of *oyer* and *terminer* grounded upon the ſtatute 28 *H.* 8. *cap.* 15. by indictment and verdict of twelve men according to the courſe of the common law, he forfeits his lands and goods by the ſtatute of 28 *H.* 8. *cap.* 15. but this works no corruption of blood, becauſe it is an offenſe, whereof the common law

takes no notice, and tho it be enacted, they ſhall ſuffer and forfeit as in caſe of felony, yet it alters not the offenſe, *Co. P. C. cap.* 49. *p.* 112. *vide tamen contra Co. Litt.* §. 745. *p.* 391.

If a man be attainted before the admiral of treaſon or felony committed upon the ſea, or before the conſtable and marſhal for treaſon or murder committed beyond the ſea, according to the courſe of the civil law, it works no corruption of blood, for tho theſe offenſes within the cognizance of the common law are felonies or treaſons, yet the manner of the trial being according to the courſe of the civil law, the judgment thereupon, tho capital, corrupts not the blood.

If there be an attainder of treaſon or felony done upon the ſea upon this ſtatute of 28 *H.* 8. by jury, according to the courſe of the common law, it ſeems that the judgment thereupon works a corruption of blood, becauſe the commiſſion itſelf is under the great ſeal warranted by act of parliament, and the trial is according to the courſe of the common law, and therefore the proceeding and judgment thereupon is of the ſame effect, as an attainder of forein treaſon by commiſſion upon the ſtatute of 35 *H.* 8. *cap.* 2. or any other attainder by courſe of the common law, and with this agrees *Co. Litt.* §. 745. *p.* 391. nay, I think farther, that if the indictment of piracy before ſuch commiſſioners upon the ſtatute of 28 *H.* 8. be formed as an indictment of robbery at common law, *viz. vi & armis & felonicè, &c.* that he might be thereupon attainted, and the blood corrupted; for whatever any ſay to the contrary, it is out of queſtion, that piracy upon the ſtatute is robbery, and the offenders have been indicted, convicted, and executed for it in the king's bench, as for a robbery, as I have elſewhere made it evident.

But indeed, if the indictment before theſe commiſſioners run only according to the ſtyle of the civil law, *viz. piraticè depredavit*, then the attainder thereupon upon the ſtatute of 28 *H.* 8. tho it gives the forfeiture of lands and goods, corrupts not the blood, and ſo are thoſe two books of the ſame author, *Co. P. C. cap.* 49. and *Co. Litt.* §. 745. to be reconciled, which without this diverſity would be contradictory: *vide H.* 13 *Car. B. R. Hilliar & Moore.*

By

By the ſtatute of *Weſtminſter* 2. *de donis conditionalibus*, if tenant in tail be attaint of felony or treaſon, there is no corruption of blood wrought as to the iſſue in tail, becauſe the very blood, as well as the land, is entailed, and yet for the advantage of the iſſue there is a corruption of blood, as if the tenant in tail alien with warranty and aſſets, and then is attainted, the lien of the warranty is gone, for that lien was not entailed. *Litt.* §. 747. but if the warranty were annexed to the gift in tail, the attainder of the donee doth not deſtroy the warranty to the iſſue, for the warranty is entailed.

The ſtatutes of 26 and 33 *H.* 8. ſubject eſtates-tail to forfeiture by attainder of treaſon, and ſo the law ſtands at this day notwithſtanding the ſtatutes of 1 *E.* 6. and 1 *Mar.* whereof before.

But yet theſe acts are not abſolutely a repeal of the ſtatute of *donis conditionalibus*, for notwithſtanding the forfeiture of the lands entailed by the attainder, yet the blood is not corrupted as to the iſſue in tail.

And therefore if the ſon of the donee in tail be attainted of treaſon in the life of the father, and die having iſſue, and then the father dies, the eſtate ſhall deſcend to the grandchild, notwithſtanding the father's attainder; but otherwiſe it would have been in caſe of a fee-ſimple. 3 *Co. Rep. Dowtie's* caſe, 10. *b.*

In all caſes (but only in caſes of entails as before) attainder of treaſon or felony corrupts the blood upward and downward, ſo that no perſon, that muſt make his derivation of deſcent to or through the party attaint, can inherit, as if there be grandfather, father and ſon, the father is attainted, and dies in the life of the grandfather, the ſon cannot inherit the grandfather. (*a*)

In caſes of collateral deſcents of lands in fee-ſimple, if there be father and two ſons, and the eldeſt is attainted in the life of the father, and dies without iſſue in the life of the father, the younger ſon ſhall inherit the father, for he needs not mention his elder brother in the conveying of his title; but if the elder ſon attaint ſurvive the father but a day, and

(*a*) *Dyer* 274.

die without iſſue, the ſecond ſon cannot inherit, but the land ſhall eſchete *pro defectu hæredis*, for the corruption of blood in the elder ſon ſurviving the father impedes the deſcent. 31 *E.* 1. *Barr*, 315.

But otherwiſe it is in caſe the eldeſt ſon had been an *alien nee*, for then notwithſtanding ſuch ſon alien were living, the land will deſcend from the father to the youngeſt ſon born a denizen.

If a man hath two ſons and then is attaint of treaſon or felony, the elder ſon purchaſeth land and dies without iſſue, either in the life-time or after the death of the father, the attainder of the father is no impediment of the deſcent from the brother to the brother. Sir *Philip Hobby*'s caſe, *Co. Litt.* 8.

And the ſame law is in caſe the father were firſt attaint, and then had iſſue two ſons, the elder purchaſes lands in fee-ſimple and dies without iſſue, the younger ſhall inherit, for tho both derive their blood from the father, yet the deſcent from the brother to the brother is immediate, and is not impeached by the attainder of the father, this tho made a doubt, *Co. Litt. p.* 8. yet was agreed generally by the judges in the exchequer-chamber in the caſe of the earl of *Holderneſs*. (*b*)

But if there be two brothers, the elder is attaint and have iſſue, and dies in the life of the younger, and then the younger die without iſſue, the lands in fee-ſimple of the younger ſhall not deſcend to the nephew, for the attainder of his father is an impediment to the derivation of his deſcent.

And accordingly it is, if the ſon of the perſon attaint purchaſe land and die without iſſue, it ſhall not deſcend to his uncle, for the attainder of his father corrupted his blood, whereby the bridge is broken between the nephew and uncle, and the one cannot inherit the other, but the land ſhall eſchete *pro defectu hæredis*: *vide accordans* ruled in *Courtney*'s caſe *infra Co. P. C. p.* 241.

Thus far for corruption of blood.

(*b*) *P.* 16 *Car.* 2. reported by the name of *Collingwood* and *Pace*, 1 *Sid.* 193. 1 *Ven.* 413.

Touching reſtitutions in blood they are of two kinds, by pardon, and by act of parliament.

The king's pardon, tho it doth not reſtore the blood, yet as to iſſues born after it hath the effect of a reſtitution.

A. hath iſſue *B.* a ſon, and then is attaint of treaſon or felony, and then is pardoned and purchaſeth land in fee-ſimple, and then hath iſſue *C.* if *A.* dies, and *B.* ſurvives, and after dies without iſſue, yet the land ſhall eſchete *pro defectu hæredis*, for the pardon reſtores not the blood between *A.* and *B.* that was born before; but if *B.* had died without iſſue in the life of *A.* and then *A.* had died, the land ſhould deſcend to *C.* becauſe he was not in being while his father's attainder ſtood in force, but was born after the purging of the crime and puniſhment by the pardon. *Co. Litt.* §. 747.

But reſtitution of blood in its true nature and extent can only be by act of parliament.

Reſtitutions by parliament are of two kinds, one a reſtitution only in blood, which only removes the corruption thereof, but reſtores not to the party attaint or his heirs the manors or honours loſt by the attainder, unleſs it ſpecially extend to it; the other is a general reſtitution not only in blood, but to the lands, *&c.* of the party attaint.

A reſtitution in blood may be ſpecial and qualified, but generally a reſtitution in blood is conſtrued liberally and extenſively.

A. hath iſſue *B.* a ſon, and is attaint of treaſon and dies, *B.* purchaſeth land in fee-ſimple, *B.* by parliament is reſtored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal anceſtors, provided it ſhall not reſtore *B.* to any of the lands of *A.* forfeited by the attainder, *B.* dies without iſſue; it was ruled, that the lands of *B.* ſhall deſcend to the ſiſters of *A.* as aunts and collateral heirs of *B.* 1. Becauſe the corruption of blood by the attainder is removed by the reſtitution. 2. Altho the words of the act of reſtitution be to reſtore *B.* only as heir to *A. &c.* yet this doth not only remove the corruption of blood, and reſtore him and his lineal heirs in blood, but alſo his collateral heirs, and removes

that impediment, which would have hindred the deſcent to them. *Co. P. C. cap.* 106. *Courtney's* caſe.

It appears *Rot. Parl.* 25 *E.* 3. *n.* 54, 55. that *John Matravers*, that was attainted of treaſon in 4 *E.* 3. obtaind letters patent from the king of reſtitution in blood, but it was not effectual, and therefore there is enacted a general reſtitution as well in blood, as to his land by a charter enacted and confirmed in parliament, namely by the king with the conſent of the lords at the petition of the commons.

II. As to the ſecond matter, namely the forfeiture of the wife's dower.

At common law the huſband being attainted of treaſon or felony the wife ſhould loſe her dower, tho it were dower aſſigned *ad oſtium eccleſiæ* or *ex aſſenſu patris*, *Co. Litt.* §. 41. *p.* 37. *ibidem* §. 747. but not upon attainder of miſpriſion of treaſon; but by the ſtatute of 1 *E.* 6. *cap.* 12. and 5 *E.* 6. *cap.* 11. tho her huſband be attainted of felony or murder, ſhe ſhall not loſe her dower.

But by attainder of her huſband of high treaſon or petit treaſon the wife ſhall loſe her dower at this day, unleſs in caſe of attainders of ſuch treaſons, where by ſpecial proviſion of parliament the wife's dower is ſaved, as upon the ſtatutes of 5 and 18 *Eliz.* touching coin.

But if the huſband ſeiſed in right of the wife hath iſſue by her, and then the wife commits treaſon, and is attainted and dies, it ſeems the huſband ſhall be tenant by the courteſy, otherwiſe it were, if the treaſon were committed before iſſue had: *vide Co. Litt.* §. 35.

III. As to the third thing, namely the forfeitures, that happen by attainder, they are of theſe kinds, of lands, or of goods and chattles, or of dignities and honours.

1. As to the forfeiture of lands, generally the lands of all perſons attainted of treaſon belong to the king, but by ſpecial privilege they may belong to a ſubject, as in caſe of the biſhop of *Durham*, *&c. de quo ſupra p.* 254, *&c.*

If at common law tenant in tail were attainted of treaſon, or at this day be attainted of felony, tho the inheritance neither eſchete nor be forfeited, yet the king hath (upon office

fice found) the freehold during the life of the tenant in tail, and not barely a pernancy of profits: adjudged T. 29 *Eliz. Clenche's* rep. *Venable's* caſe, and 3 *Leon. n.* 236. (c) *Co. Litt.* §. 747. and the ſame law it is for tenant of life attaint.

But an attainder of treaſon or felony of a copyholder gives the king no forfeiture, but regularly it belongs to the lord, unleſs ſpecial cuſtom be to the contrary.

By the cuſtom of *Kent*, if the anceſtors be attaint of felony and executed, yet his lands ſhall not eſchete but deſcend to the heir; but if he be attaint by outlawry, or abjure, they are not privileged by the cuſtom from eſchete.

But if he be any way attaint of treaſon, yet the forfeiture thereof belongs to the king notwithſtanding that cuſtom. 8 *E.* 2. *Preſcription* 50. *Lambert's Perambulatio Kantiæ, p.* 551.

If the tenant hold lands of a common perſon, and commit treaſon and be attaint, yet the forfeiture belongs to the king of common right, as a royal eſchete; but if ſuch perſon commit felony or petit treaſon and be attaint, the lands eſchete to the lord, of whom they were immediately held, only the king ſhall have the year, day, and waſte of the tenement ſo eſcheted for felony or petit treaſon. *Stamf. Prærogativa Regis, cap.* 16. (d)

The commencement of this year and day is neither from the attainder nor from the death of the party attaint, but from the time of the inquiſition found, tho the ſame be not found for many years after the death of the perſon attaint. 49 *E.* 3. 11.

If tenant in tail or for life, or the huſband ſeiſed in right of his wife be attaint of felony, the king ſhall have the year, day and waſte againſt the wife, the iſſue in tail, and him in reverſion. *Stamf. P. C. Lib.* III. *cap.* 30. (e), 3 *E.* 3. *Coro.* 327. but of this more hereafter.

The relation of the forfeiture or eſchete of lands for treaſon or felony to avoid all meſne incumbrances is to the time of the offenſe committed.

A. and *B.* jointenants in fee, *A.* is attaint of treaſon or felony and dies, the land ſurvives to *B.* but yet ſubject to the

4 title

(c) *p.* 185. (d) See *Mag. Chart. cap.* 22. 2 *Co. Inſtit.* 36. (e) 190. *b.*

title of the forfeiture. *H.* 10 *Car. Rot.* 342. *B. R. Harriſon* and *Walden.*

If a man ſeiſed in fee alien, and then be attaint of treaſon or felony by confeſſion or abjuration upon an indictment ſuppoſing the felony committed before the alienation, the alienee may not only falſify the attainder in the point of the time of the felony ſuppoſed, but alſo in the very point of the felony or treaſon itſelf, and is not concluded by the confeſſion of the alienor, tho the alienor himſelf be concluded. 49 E. 3. 11. 7 E. 4. 1. *Co. P. C. cap.* 104. *p.* 231.

But if he be attaint of felony or treaſon by verdict upon an indictment, ſuppoſing the offenſe before the alienation, tho the alienee cannot falſify the attainder by ſuppoſing there was no felony committed, yet he may falſify it as to the point of time, *viz.* he may allege contrary to the indictment, that the felony or treaſon was committed after the alienation, and not before, *Co. P. C. ubi ſupra* 32 *Eliz. Syer's* caſe.

If a man be indicted of a felony or treaſon ſuppoſed the 1ſt of *April* 24 *Car.* and in truth it was committed 1 *Junii* 24 *Car.* yet he ſhall be convicted notwithſtanding that variance, for the day is not material; yet in ſuch caſe for the avoiding of the danger and trouble, that may enſue by the relation of ſuch attainder to the day mentiond in the indictment, it is fit for the jury to find the true day: *vide Syer's* caſe, *ubi ſupra.*

If a man be outlawed upon an indictment of felony or treaſon, and pending the proceſs he alien the land, yet the king or lord ſhall have the land, which he held at the time of the felony committed, for the indictment contains the year and day, when it was done, unto which the attainder by outlawry relates.

But if a man ſue an appeal by writ of felony or murder, and pending it the party aliens, and then is outlawed before appearance, the lords eſchete is loſt, becauſe it relates only to the time of the outlawry pronounced, in as much as the writ of appeal is general, and contains no certain time of the offenſe committed, cited to be adjudged 5 *E.* 6. *Co. Litt.* §. 4. *fol.* 13. *a.*

But it ſeems, that if the defendant had appeared and the plaintiff had declared upon his writ, and the defendant had been convict and attaint by verdict or confeſſion, or if the appeal had been by bill, and thereupon the party had been outlawed, tho before appearance, the eſchete had related to the time of the fact committed to avoid meſne incumbrances, for in the declaration in the one caſe, and in the bill in the other caſe, the year and day of the felony is ſet forth.

Touching forfeiture of goods.

The goods of a perſon convict of felony or treaſon, or put in exigent for the ſame, or that fled for theſe offenſes, or that ſtands mute, are forfeit to the king.

But the relation of theſe forfeitures refer not to the time of the offenſe committed nor to the time of the flight, but only to the conviction or to the time preſented, or to the time of the exigent awarded.

And therefore an alienation made by the felon or traitor, or perſon flying *bonâ fide* and without fraud, meſne between the offenſe or the flight, and the conviction or preſentment of the flight is good, and binds the king, but if fraudulent, then it is avoidable by the ſtatute of 13 *Eliz. cap.* 5. 3 *E.* 3. *Coron.* 296. *ibidem* 344.

If a man commit a felony and be purſued, and in the flight be killed, whereby he can neither be indicted nor convict, yet if this matter be found by inquiſition before the juſtices in *eyre* or of *oyer* and *terminer*, he ſhall forfeit the goods he had at the time of the flight, and not thoſe only, which were his at the time of the inquiſition found, for there it muſt relate to the flight, becauſe the party is dead, and can be no farther proceeded againſt, 3 *E.* 3. *Coron.* 290, 312.

If a party be acquitted of treaſon or felony, the jury that acquits him ought to enquire of his flight for it, and if they find he fled, what goods he had, for his goods and chattles are thereby forfeited; but this is but an inqueſt of office, and therefore is traverſable by the party: *vide Stamf. P. C. Lib.* III. *cap.* 21. (*f*)

(*f*) *f.* 185. *b.*

But upon an inquiſition before the coroner of the death of a man *ſuper viſum corporis*, tho the party accuſed be acquitted, yet if it be preſented, that he fled for it, it is doubted whether that inquiſition as to the flight be traverſable: *vide Stamf. P. C. Lib.* III. *cap.* 21.

But on all hands it is agreed, that if the coroner upon the inqueſt *ſuper viſum corporis* preſent one as guilty, and that he fled for it, and the party is arraigned and found not guilty, and alſo that he did not fly, yet that doth not avoid the firſt inquiſition as to the flight, but the beſt ſhall be taken for the king, tho both are in the nature of inqueſts of office: 22 *Aſſ.* 96. *Forfeitures* 27. 3 *E.* 4. *Forfeitures* 35. *H.* 13 *H.* 4. *Forfeitures* 32. 7 *Eliz. Dy.* 238. *b.*

A *fugam fecit* by the principal or acceſſary before in murder, if the fact be preſented before the coroner, entitles the king to the goods of the offender, for theſe are within the cognizance of the coroner, but the coroner hath no power to enquire of acceſſaries after, nor conſequently of their flight, and therefore a preſentment before the coroner of the flight of an acceſſary after gives the king no title to the goods. 4 *H.* 7. 18.

The uſage was always upon a preſentment of homicide before the coroner, or of flight for the ſame, or upon a conviction of felony by the petit jury, or the finding of a flight for the ſame, to charge the inqueſt or jury to enquire, what goods and chattels he hath, and where they are, and thereupon to charge the *Villata* where ſuch goods are with the goods to be anſwerable to the king: *vide* 3 *E.* 3. *Corone* 296. *& alibi, vide* ſtatute 31 *E.* 3. *cap.* 3.

But tho goods of an offender be not forfeited till the conviction or flight found by inqueſt, yet whether they may be ſeiſed upon the offenſe committed, hath been controverted.

1. It ſeems clear, that at common law if a man had committed felony or treaſon, or tho poſſibly he had committed none, yet if he had been indicted or appeald by an approver, the ſheriff, coroner, or other officer could not ſeize and carry away the goods of the offender or party accuſed.

2. Again,

2. Again, he could not in that caſe have removed the goods out of the cuſtody of the offender or party accuſed, and deliver them over to the conſtables or to the *Villata* to anſwer for them. 13 *H.* 4. 13.

3. But if the party were indicted or appeald by an approver, the ſheriff, or other officer might make a ſimple ſeiſure of them only to inventory and appraiſe them, and leave them in the cuſtody of the ſervants or bailiff of the party indicted, in caſe he would give ſecurity againſt their being imbezzled, or in default thereof he might deliver them to the conſtable or *Villata* to be anſwerable for them, but yet ſo that the party accuſed and his family have ſufficient out of them for their livelihood and maintenance (*g*), *viz. Salvis capto & familiæ ſuæ neceſſariis eſtoveriis ſuis, & ſi captus convictus fuerit de feloniâ unde rettatus eſt, reſiduum bonorum ultra eſtoverium illud regi remaneat. Bract. Lib.* III. 123. *Fleta, Lib.* I. *cap.* 26. 43 *E.* 3. 24. 44 *Aſſ.* 14. *Stamf. P. C. Lib.* III. *cap.* 32. *Co. P. C.* 228, 229.

4. And poſſibly the ſame law was, tho he were not indicted or appeald, but *de facto* had committed a felony, but with this difference, if he had been indicted or appeald by an approver, this kind of ſeizure might have been made, whether he committed the felony or not; for in the books of 43 *E.* 3. and 44 *Aſſ.* there is no averment, that the felony was committed, but only that he was thus *accuſed* of record, and ſo is the book of 13 *H.* 4. 13.

But in caſe there were no indictment, then it is at the peril of him that ſeiſeth, if he committed not the felony, and therefore it is iſſuable.

Now touching alterations by the ſtatutes after made.

It ſeems, that by the ſtatute of 5 *E.* 3. *cap.* 9. and the enſuing ſtatutes, whereby it is enacted, that no man's goods ſhall be ſeized into the king's hands without indictment or due proceſs of law, that it was held, that this kind of ſeizure of the goods of a perſon accuſed of felony, tho it be only *in cuſtodiam & cauſa rei ſervandæ*, hath been held unlawful, if the perſon were not firſt indicted, or at leaſt appeald by an approver;

(*g*) See *State Tr. Vol.* IV. *p.* 615. Sir *W. Parkins's* caſe.

approver; and ſo the books ſeem to import of 43 *E.* 3. 24. and 13 *H.* 4. 13. and expreſly my lord *Coke*, *P. C. cap.* 103. *p.* 228.

By the ſtatute of 25 *E.* 3. *cap.* 14. where a party is indicted of felony, the proceſs directed by that ſtatute is firſt a *capias*, and if he be not found a ſecond *capias* together with a precept to ſeize his goods, and if he be not found then, an exigent and the goods to be forfeit.

And this is more than a ſimple ſeizure, ſuch as was before at common law, for if the party came not in, his goods are forfeit upon the award of the exigent; and if he came in, tho his goods be ſaved, yet there is no direction for delivering his goods upon ſecurity; but it ſeems the ſheriff is to take them into his cuſtody, and yet out of them muſt allow ſufficient for the ſuſtenance of the priſoner and his family.

Quære, whether in the caſe of ſuch a ſeizure a ſale for a valuable conſideration before conviction and after ſeizure do not bind the king, as it ſeems it doth in a caſe of ſeizure and delivery to the *Villata*: *vide* 8 *Co. Rep.* 171. *Fleetwood*'s caſe.

This ſtatute extends as well to treaſon as to felony, and yet it mentions only felony, and therefore at this day the exigent goes out upon the ſecond *Capias* returned *non inventus*, as well in treaſon, as felony.

By the ſtatute of 1 *R.* 3. *cap.* 3. it is enacted, "That neither ſheriff, *&c.* nor other perſon take or ſeize the goods "of any perſon arreſted or impriſoned before he be convict "of the felony according to the law of *England*, or before "the goods be otherwiſe lawfully forfeited, upon pain of "forfeiting the double value of the goods ſo taken.

Mr. *Stamford* thinks this is but in affirmance of the common law, only that it gives a penalty, but it ſeems to be ſomewhat more than ſo, for this prohibits the ſeizure of the goods of a party impriſoned, tho he were alſo indicted, but not yet convicted, where unqueſtionably the common law allowed ſuch a ſeizure, as is before declared, if the party or his friends did not ſecure the forth-coming of the goods, where the party was indicted.

But upon this ſtatute theſe things are conſiderable.

1. Whether it extend to treaſon; it ſeems it doth, for as all treaſon is felony and more, ſo in a ſtatute of this nature for advancing of juſtice it ſeems compriſed in it, for it is within the reaſon of the law, and *vide Co. P. C. p.* 228. tho I know it was otherwiſe held, or at leaſt doubted in the caſe of Sir *Henry Vane*, whoſe rents were ſtopt in the tenants hands, and no precept was granted for their delivery, tho before conviction, yea and before the indictment, tho after impriſonment 1661.

2. Whether it extend to a party, that is at large and out of priſon, whether indicted or not indicted, and as to that, 1. It ſeems clearly, that it doth not repeal the ſtatute of 25 *E.* 3. *cap.* 14. touching the ſecond *Capias* with a ſeizure of goods. But 2. As to other perſons, that are at large and not indicted, nor proceſs, as before, made upon their indictment, it ſeems to me, that if they fly not, there can be no ſeizure at all made, whether they are indicted or not, for the ſtatute did not intend a greater privilege to a party impriſoned for an offenſe of this nature, than he that is at large. 3. That if he be at large and fly for it, yet his goods cannot be ſeized and removed, whether he be indicted or not indicted. 4. That if he he indicted and at large, yet the goods cannot be removed, but only viewed, appraiſed, and inventoried in the houſe or place, where they lie. 5. That altho the goods may not be removed, becauſe the ſtatute now hath taken away that removal, that was in ſome caſes at common law, yet neither in caſe of treaſon nor in caſe of felony, where the party is at large, is it within the penalty of the ſtatute as to the point of forfeiture of the double value, for as to that the ſtatute is penal, but it is within the directive and prohibitory part of the ſtatute, which by an equal conſtruction and interpretation prohibits the thing to be practiſed, and hath altered the law as to the removing of the goods of the party before conviction.

And yet I know not how it comes to paſs, the uſe of ſeizing of the goods of perſons accuſed of felony, tho impriſond or not impriſond, hath ſo far obtaind notwithſtanding this ſtatute, that it paſſeth for law and common practice as well by conſtables, ſheriffs

ſheriffs and other the king's officers, as by lords of franchiſes, that there is nothing more uſual: *vide Dalton's Juſtice of Peace, cap.* 110. (*b*) in affirmation of it, *viz.* that the officer may ſtill take ſurety, that the goods be not embezzled, and for want of ſureties may ſeize and praiſe them, and then deliver them to the town ſafely to be kept, until the priſoner be convict or acquit, and cites for it *Stamf.* 192. 8 *Rep.* 171. and *B. Forfeiture* 44.

It ſeems the opinion therefore of my lord *Coke, P. C. cap.* 103. hath truly ſtated the law, at leaſt as it ſtands upon the ſtatute of 1 *R.* 3.

1. That before the indictment the goods of any perſon cannot be ſearched, inventoried, nor in any ſort ſeized.

2. That after indictment they cannot be ſeized and removed, or taken away before conviction or attainder; but then it may be ſaid, to what purpoſe may they be ſearched and inventoried after indictment, if they may not be removed, but are equally liable to imbezzling as before.

I think he is not bound to find ſureties, neither hath the officer at this day any power to remove them in default of ſureties, and commit them to the vill, but only to inventory them and leave them where he found them, (unleſs in caſe of the ſecond *Capias*, whereof before) for the priſoner or party indicted may ſell them *bonâ fide*; and if he may do ſo, the vendee may take them, and the *Villata* cannot refuſe the delivery of them to the vendee, tho the goods had been deliverd to them.

But there is this advantage by the viewing and appraiſing, that thereby the king is aſcertaind what the goods are, and may purſue them, that take or embezzle them, by information, (if the party happen to be convict) and try the property with them, whether they are really ſold, or ſold only fraudulently without valuable conſideration to prevent the forfeiture, and ſo forfeited by the ſtatute of 13 *Eliz. cap.* 5. notwithſtanding ſuch fraudulent ſale.

IV. Laſtly, touching execution of judgments of treaſon, they are directed by the judgment, whereof before.

There

(*b*) *New Edit. cap.* 163. *p.* 538.

There be nevertheleſs ſome things, that accidentally happen, that ſuſpend or abate the execution.

1. Reprieves *ex arbitrio regis vel judicis*, the king may by command or precept under his great or privy ſeal, privy ſignet, or ſign manual, yea by ſignification under the hand of the ſecretary of ſtate, or at this day by the ſubſcription of a maſter of requeſts, command the reprieve of one condemned of treaſon or felony.

And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treaſon before him, yet he may upon due circumſtances do it, as well in caſe of treaſon, as felony.

And this reprieve he may grant, and after he hath granted it may command execution after the ſeſſions and adjournment of the commiſſion. *Dy.* 205.

There are other reprieves, which are not arbitrary, but *quaſi de jure.*

1. In reſpect of pregnancy, for tho pregnancy be no plea to delay judgment, yet it is a plea to delay execution, and therefore whenever any judgment in treaſon or felony is given againſt a woman, it is the duty of the judge, before he finiſh his ſeſſions, to demand of her what ſhe can allege why execution ſhould not be made; yea in all caſes, where a priſoner attaint is brought into another court, or reprieved to another ſeſſions, he ought not to have any award of execution againſt him, till he be firſt demanded, what he can ſay, why it ſhould not be, for poſſibly he may have a pardon after judgment. 22 *Aſſ.* 71.

This plea of pregnancy *in retardationem executionis* hath theſe incidents to it: 1. She muſt be with child of a quick child. 2. If it be alleged, the judge, before whom it is alleged, muſt impanel an inqueſt of women *ex officio* to enquire of the truth of her allegation, *viz.* whether ſhe be with child of a quick child, and if they find ſhe is, then her execution is to be reſpited, if not, ſhe is to be executed.

If it be found by the jury of women, that ſhe is ſo with child, ſome have uſed to command a reſpit of her execution till a convenient time, for inſtance a month after her deli-

very, and then to be executed; but this ſeems irregular, for ſhe may have a pardon to plead, and therefore it is to be reſpited till another ſeſſions. 12 *Aſſ.* 10.

If ſhe have once had the benefit of this reprieve and be deliverd, and afterwards be with child again with another quick child, ſhe ſhall not have the benefit of a farther reſpit of the ſame judgment for that cauſe: *quod vide* 23 *Aſſ.* 2. *Coron.* 188. 22 *E.* 3. *ibidem* 253.

If the jury of women be miſtaken in their verdict, and find her quick with child, where in truth ſhe was not at all with child, (as once it happend at *Aylesbury*) if the next ſeſſions of gaol-delivery, or *oyer* and *terminer* happen at that diſtance, that it is impoſſible by the courſe of nature, that ſhe could be with child, but ſhe muſt be deliverd meſne between the former ſeſſions and this, as if it were ten months, *&c.* ſhe ſhall be executed; but if the ſecond ſeſſions happen within ſuch time after the firſt, that by courſe of nature ſhe may ſtill continue with child, as if it be within the diſtance of ſix months or the like, then ſhe ſhall continue under the firſt reprieve till another ſeſſion, *nam licet tempus ordinarium vitalis fœtus ſit poſt* 16. *vel* 18. *ſeptimanas poſt impregnatam, tamen in quibuſdam citius contingere poteſt juxta medicorum placita.*

If in truth ſhe were not with child with a quick child at the time, when the jury gave their verdict, but became quick after, nay tho ſhe were not at all with child then, but became with child before the time of the ſecond ſeſſion with a quick child, in my opinion ſhe ſhall have a ſecond reprieve by reaſon of pregnancy, for the advantage that ſhe had at firſt was not really becauſe of pregnancy, but by a miſtake of the jury of women, and therefore *in favorem prolis* ſhe ſhall now have it.

And therefore, as hath been ſaid, in all caſes of reprieves for pregnancy the judge ought to make a new demand, what the priſoner hath to ſay, wherefore execution ſhould not be awarded, for the firſt reſpite being by a kind of matter of record ſhall not be determined without a new award of exe-

cution; and altho clerks of aſſiſes enter thoſe reſpites and awards only in a book of *Agenda*, yet regularly they are ſuppoſed to be entred of record, and theſe memorials are warrants for ſuch entries, tho *de facto* it be not uſually done.

Another cauſe of regular reprieve is, if meſne between the judgment and the award of execution the offender become *non compos mentis* (*i*), the judge in that caſe may both in caſe of treaſon and felony ſwear a jury to inquire *ex officio*, whether he be really ſo, or only feigned or counterfeit; and thereupon if it be found that he be really diſtracted, muſt award a reprieve *de jure* till another ſeſſions, *Co. P. C. p.* 4. and the ſtatute of 33 *H.* 8. *cap.* 20. that directed an execution of parties convict of treaſon notwithſtanding infanity intervening after judgment is repeald, by 1 *&* 2 *P. & M. de quo ſupra p.* 283.

Now as to the abating of ſome parts of the execution in caſe of high treaſon, as drawing, hanging, eviſceration and quartering, and leaving the offender only to be beheaded, this may be, and uſually is by the king's warrant under his great ſeal, privy ſeal, yea or his privy ſignet, or ſign manual, as uſually is done in caſe of noblemen or great men falling under that judgment, for one part of the judgment, *viz.* decollation, and the ſubſtance of the whole judgment, *viz.* the death of the party, is performed.

CHAP.

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(*i*) See Sir *John Hawles*'s remarks on the trial of *Charles Bateman*, *State Tr. Vol.* IV. *p.* 204.

CHAP. XXVIII.

Touching the crime of miſpriſion of treaſon, *and* felony, *&c.*

THO the order propoſed in the beginning ſhould refer miſpriſion of treaſon to that ſeries of offenſes, that are not capital, yet becauſe this offenſe hath relation to treaſon, and may be of uſe to explain the nature of it, I ſhall here take it into conſideration, referring miſpriſion in its large and comprehenſive nature to its proper place.

Miſpriſion of treaſon is of two kinds.

1. That which is properly ſuch by the common law.

2. That which is made miſpriſion of treaſon by act of parliament.

Miſpriſion of treaſon by the common law is, when a perſon knows of a treaſon, tho no party or conſenter to it, yet conceals it and doth not reveal it in convenient time.

Tho ſome queſtion was antiently, whether bare concealment of high treaſon were treaſon, yet that is ſettled by the ſtatute of 5 & 6 *E.* 6. *cap.* 11. and 1 & 2 *P. & M. cap.* 10. *viz.* that concealment or keeping ſecret of high treaſon ſhall be deemed and taken only miſpriſion of treaſon, and the offender therein to ſuffer and forfeit, as in caſes of miſpriſion of treaſon, as hath heretofore been uſed: tho in the time of *Henry* VIII. and *Edward* VI. ſome things were made miſpriſion of treaſon, that were not ſo formerly, yet by the ſtatute of 1 *Mar. cap.* 1. it is enacted, that nothing be adjudged to be treaſon, petit treaſon, or miſpriſion of treaſon, but what is contained in the ſtatute of 25 *E.* 3. and altho that act of 25 *E.* 3. do not make or declare miſpriſion of treaſon, yet it doth it in effect by declaring and enacting what is treaſon, which is the matter or ſubject of miſpriſion of treaſon,

tho

tho the miſpriſion or concealment thereof be a crime, which the common law defines what it is.

Therefore ſince the ſtatute of 25 *E.* 3. is by the ſtatute of 1 *Mar. cap.* 1. made the ſtandard of treaſon, it remains to be inquired, what ſhall be ſaid the concealment of ſuch a treaſon according to the reaſon and rule of the common law.

If a man knew of a treaſon, by the old law in *Bracton*'s time he was bound to reveal it to the king or ſome of his council within two days, *quod ſi ad tempus diſſimulaverit & ſubticuerit, quaſi conſentiens & aſſentiens, erit ſeductor domini regis* (*a*); but at this day it is but miſpriſion, if he reveals it not as ſoon as he can to ſome judge of aſſiſe, or it ſeems to ſome juſtice of peace, for tho the crimes of treaſon or miſpriſion of treaſon be not within the commiſſion of a juſtice of peace to hear and determine, yet, as it is a breach of the peace, the juſtices of peace may take information upon oath touching it, and take the examination of the offenders and impriſon them, and bind over witneſſes and tranſmit theſe examinations and informations to the next ſeſſions of gaol-delivery or *oyer* and *terminer* to be further proceeded upon, as is truly obſerved by Mr. *Dalton* (*b*), *cap.* 90. nay, I have known chief juſtice *Rolls* affirm, that juſtices of the peace may take an indictment of treaſon, tho they cannot determine it, *viz.* as an information or accuſation tending to the preſervation of the peace.

But ſome treaſons enacted by ſome ſtatutes are limited to be heard and determined by them, as appears in ſome of the ſtatutes before mentiond, *p.* 350.

It is ſaid 3 *H.* 7. 10. *Stamf.* 38. *a. Dalton, cap.* 89. (*c*), the uttering of falſe money known to be falſe is miſpriſion of treaſon; but it is a miſtake; indeed it is a great miſpriſion, but not miſpriſion of treaſon, unleſs the utterer know him, that counterfeited it, and conceal it, this indeed is miſpriſion of treaſon,

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(*a*) *Bract. Lib.* III. *de corona, cap.* 3.
(*b*) *New Edit. cap.* 141. *p.* 460.
(*c*) *New Edit. cap.* 140. *p.* 452. This laſt book ſays it is miſpriſion of treaſon, but the other two only ſay it is a miſſion.

treaſon, but not the uttering of it, for the money is not the traitor, but he that counterfeited it, and his counterfeiting is the treaſon.

As all treaſons and declarations of treaſons between 25 *E.* 3. and 1 *Mar.* are repeald by 1 *Mar. cap.* 1. ſo conſequently all miſpriſions of any other treaſon not containd in 25 *E.* 3. are thereby repeald, *Coke P. C. p.* 24. hath theſe words, *Miſpriſion of treaſon is taken for concealment of high treaſon or petit treaſon, and only of high treaſon or petit treaſon ſpecified and expreſſed in the act of* 25 E. 3. and in the margin, *that is of ſuch treaſon high or petit, as is expreſſed in the act of* 25 E. 3. *and of no other treaſon*; and accordingly uttering of counterfeit coin was agreed by the court (*d*) at *Newgate, Auguſt* 1661. to be neither treaſon nor miſpriſion of treaſon within the ſtatute of 25 *E.* 3. but only puniſhable with fine and impriſonment; *ex libro domini Bridgman manu ſuâ ſcripto.*

If a ſubſequent act of parliament after 1 *Mar.* make a new treaſon, the concealment of ſuch a treaſon is certainly miſpriſion of treaſon for theſe reaſons, 1. Becauſe miſpriſion of treaſon is not any ſubſtantive crime of itſelf, but relative to that, which is, or is made treaſon, and a kind of neceſſary conſequent and reſult from it, as the ſhadow follows the ſubſtance. 2. And hence it is, that tho the ſtatute of 25 *E.* 3. does not by expreſs words enact miſpriſion of treaſon to be an offenſe, yet treaſons being ſettled by that act, the ſtatute of 1 *Mar. cap.* 1. enacts there ſhall be no miſpriſion of treaſon but what is enacted by the ſtatute of 25 *E.* 3. for tho that act ſpeak not of miſpriſion of treaſon, yet ſettling thoſe things that are treaſon, it doth virtually and conſequentially make the concealing of any of them miſpriſion of treaſon; but yet farther, when the act of 1 *&* 2 *P. & M. cap.* 10. enacts divers new treaſons, tho it enact nothing to make the concealment thereof miſpriſion, yet in the proviſo above-mentiond it takes notice, that concealment of any of theſe treaſons would be at leaſt miſpriſion of treaſon, and therefore provides, that the concealment thereof ſhall not be adjudged

(*d*) In the caſe of *Richard Oliver, Kel.* 33.

treaſon, but only miſpriſion of treaſon, any thing above-mentiond to the contrary thereof notwithſtanding; and the like clauſe is in the above-mentiond ſtatute of 5 & 6 *E.* 6. *cap.* 11. Again, my lord *Coke*, *P. C. cap.* 65. *p.* 139. ſays, *As in caſe of high treaſon, whether the treaſon be by the common law or ſtatute, the concealment of it is miſpriſion of treaſon; ſo in caſe of felony, whether the felony be by the common law or by ſtatute, the concealment of it is miſpriſion of felony*; ſo that certainly, if a felony or a treaſon be enacted by a new law, the concealment of the former falls under the crime of miſpriſion of felony, and the latter under the crime of miſpriſion of treaſon, as a conſequent of it without any ſpecial words enacting it to be ſo.

All treaſon is miſpriſion of treaſon and more, and therefore, he that is aſſiſting to a treaſon, may be indicted of miſpriſion of treaſon, if the king pleaſe. *Stamf. P. C.* 37. *b. Co. P. C.* 36. 2 *R.* 3. 10. *b.*

Altho the ſtatute of 1 & 2 *P. & M. cap.* 10. hath as to treaſons repeald the ſtatute of 33 *H.* 8. *cap.* 23. for trying treaſons in one county committed in another, yet it hath not repeald the ſame ſtatute as to the trial of murder and miſpriſion of treaſon, which may yet be tried according to the ſtatute of 33 *H.* 8. *cap.* 23.

In caſe of miſpriſion of treaſon and miſpriſion of felony, as well as in caſe of treaſon or felony, or acceſſary thereunto, a peer of this kingdom ſhall be tried by peers, but the indictment is to be by a common grand inqueſt. 2 *Co. Inſt.* 49.

The judgment in caſe of miſpriſion of treaſon is loſs of the profits of his lands during his life, forfeiture of goods, and impriſonment during life.

By what hath been ſaid touching miſpriſion of treaſon we may eaſily collect what is the crime of miſpriſion of felony, namely, that it is the concealing of a felony which a man knows, but never conſented to, for if he conſented, he is either principal or acceſſary in the felony, and conſequently guilty of miſpriſion of felony and more.

The judgment in caſe of miſpriſion of felony in caſe the concealer be an officer, as ſheriff or bailiff, *&c.* is by the ſta-

tute of *Weſtminſt.* 1. *cap.* 9. (*e*) impriſonment for a year and ranſom at the king's pleaſure; if by a common perſon, it is only fine and impriſonment.

And note once for all, that all thoſe acts of parliament, that ſpeak of fines or ranſoms at the king's pleaſure, are always interpreted of the king's juſtices: *vide Co. Magna Carta ſuper ſtat. Weſtminſt.* 1. *cap.* 4. *in fine* (*f*) *& ſæpius alibi.* 2 *R.* 3. 11. *a. voluntas regis in curiâ*, not *in cameră.*

And it ſeems, that miſpriſion of petit treaſon is not ſubject to the judgment of miſpriſion of high treaſon, but only is puniſhable by fine and impriſonment, as in caſe of miſpriſion of felony.

II. I come to miſpriſions of treaſon ſo enacted by acts of parliament ſince 1 *Mar. cap.* 1. for, as before is obſerved, by that act all miſpriſions, that by any ſtatute made after 25 *E.* 3. are either expreſly or conſequentially made miſpriſions of treaſon, are repeald and ſet aſide.

All acts of parliament, that after 1 *Mar.* enacted any thing to be high treaſon, do conſequentially make the concealment thereof to be miſpriſion of treaſon, tho it do not in expreſs words enact the concealment thereof to be miſpriſion of treaſon, as hath been before ſhewn, and the like in caſe of felony.

And conſequently thoſe acts of parliament, which enacted temporary treaſons, as the ſtatute of 1 *& 2 P. & M. cap.* 10. the act of 1 *Eliz. cap.* 5. *&c.* ſo far forth as they are temporary, the miſpriſions of ſuch treaſons are alſo temporary, and expire with the act, and where the acts of treaſon are perpetual, or being but temporary are made perpetual by ſome other act of parliament, the miſpriſion of ſuch treaſons remains ſuch, as long as the act of parliament making ſuch treaſon continues, or is continued, as upon the ſtatutes of 5 *Eliz.* and 18 *Eliz.* 1 *Mar.* touching counterfeiting of forein coin made current by proclamation, or clipping or waſhing coin.

And the like is to be ſaid in all reſpects of miſpriſion of felony made ſo by act of parliament.

But

(*e*) 2 *Co. Inſt.* 142. (*f*) 2 *Co. Inſt.* 168.

But beſides theſe crimes, that are conſequentially miſpriſion of treaſon, ſome offenſes are made miſpriſion of treaſon, as a kind of ſubſtantive offenſe, and not conſequential upon the making of treaſon, but particularly enacted.

Thoſe of that kind, that are perpetual and have continuance, are as follow:

14 *Eliz. cap.* 3. "They that counterfeit forein coin of gold "or ſilver not permitted to be current in this kingdom, their "procurers, aiders, and abetters ſhall ſuffer, as in caſe of "miſpriſion of treaſon.

And note, that in that act (*aiders*) are intended of aiders in the fact, not aiders of their perſons, as receivers and comforters, for, as hath been obſerved *p.* 236. in ſome acts of parliament *aiders* being joined with procurers, counſellors and abetters are intended of thoſe, that are aiding to the fact; but in other acts of parliament, where the word *aiders* is joined with maintainers and comforters, it is intended of thoſe, that are aiders *ex poſt facto* to their perſons; ſee this difference in the penning of ſeveral acts of parliament, for the firſt part 5 *Eliz. cap.* 11. 18 *Eliz. cap.* 1. 1 *Mar. ſeſſ.* 2. *cap.* 6. touching coin, and for the ſecond part this expreſs diſtinction obſerved 13 *Eliz. cap.* 2. touching publiſhing of bulls of abſolution, where the former kind are enacted to be traitors; the ſecond incur a *præmunire*; the like 23 *Eliz. cap.* 1.

13 *Eliz. cap.* 2. "If any bull or abſolution, or inſtrument "of reconciliation to the ſee of *Rome* be offered to any per-"ſon, or if any perſon be moved or perſwaded to be recon-"ciled, if he conceal the ſaid offer, motion or perſwaſion, "and doth not diſcover or ſignify it by writing or otherwiſe "within ſix weeks to ſome of the privy council, *&c.* he ſhall "incur the penalty and forfeiture of miſpriſion of treaſon, "and that no perſon ſhall be impeached for miſpriſion of "treaſon or any offenſe made treaſon by this act, other than "ſuch as are before declared to be in caſe of miſpriſion of "treaſon:" *nota*, had it not been for this cauſe the concealment generally of any treaſon within this act had been miſpriſion of treaſon.

23 *Eliz. cap.* 1. " All perſons, that ſhall put in practice to " abſolve or withdraw the ſubjects of the queen from their " obedience, or to that end perſwade them from the reli- " gion here eſtabliſhed, or if any perſon ſhall be ſo abſolved, " every ſuch perſon, and their counſellors and procurers " thereunto, ſhall be adjudged guilty of high treaſon.

" And all perſons, that ſhall wittingly be aiders and main- " tainers of ſuch perſon ſo offending, or any of them, know- " ing the ſame, or which ſhall conceal any offenſe aforeſaid, " and not reveal it within twenty days after his knowledge " thereof to ſome juſtice of peace, or other higher officer, " he ſhall ſuffer and forfeit, as in miſpriſion of treaſon.

CHAP. XXIX.

Concerning petit treaſon.

AS at common law there was great uncertainty in high treaſon, ſo there was in petit treaſon.

It is true, that all the petit treaſons declared in this ſtatute (*a*) were petit treaſons at common law, as for a ſervant to kill his maſter or miſtreſs, 12 *Aſſ.* 30. a woman to kill her huſband, as appears 15 *E.* 2. *Corone* 383. and the judgment was the ſame at common law in ſuch caſes, as now, and the lands of him, that was attaint of petit treaſon, eſcheted to the meſne lord, of whom they were held, 22 *Aſſ.* 49. ſo that as to theſe things the act of 25 *E.* 3. was but an affirmance of the common law.

But yet there were certain offenſes, that were petit treaſon at common law, that are reſtrained and abrogated by this ſtatute from being petit treaſon.

(*a*) *vid.* 25 *Edw.* 3.

15 E. 2. *Corone* 383. A woman intending to kill her huſband beat him ſo, that ſhe left him for dead, but yet he recovered, for this attempt the wife had judgment to be burned. *Fleta, Lib.* I. *cap.* 22. *Britton, cap.* 8. If the homager or ſervant falſify the ſeal of his lord, or had committed adultery with the lord's wife or daughter (*b*), it was petit treaſon.

But theſe are taken away by this act of 25 E. 3. and are reduced only to theſe three ranks:

1. The ſervant killing his maſter or miſtreſs. 2. The wife killing her huſband. 3. The clergyman killing his prelate or ſuperior, to whom he owes faith and obedience.

All petit treaſon comes under the name of felony, and a pardon of all felonies, where petit treaſon is not excepted, at common law pardoned petit treaſon, and ſo at this day doth a pardon of murder.

A man or woman, that commits petit treaſon, may be indicted of murder, but if all felonies, *&c.* are pardoned by act of parliament, wherein there is an exception of murder, it ſeems that a murder, which is a petit treaſon alſo, is diſcharged and not within the exception, *M.* 6 *&* 7 *Eliz. Dyer* 235. (*c*)

The killing of a maſter or huſband is not petit treaſon, unleſs it be ſuch a killing, as in caſe of another perſon would be murder, and therefore upon an indictment of petit treaſon for a ſervant killing his maſter, if upon the circumſtances of the caſe it appear to be a ſudden falling out, and the ſervant upon a ſudden provocation kill his maſter, which, in caſe it had been between other perſons, had been only manſlaughter, the jury may acquit him of petit treaſon, and find him guilty of manſlaughter; and thus it was once done before me at *Dorcheſter* aſſiſes, and another time before juſtice *Windham* at *Coventry* aſſiſes, tho the indictment were for petit treaſon.

If a wife conſpire to kill her huſband, or a ſervant to kill his maſter, and this is done by a ſtranger in purſuance of that

3

(*b*) *Britton* adds, *or the nurſes of his children.*

(*c*) The reaſon of this is, becauſe petit treaſon is an offenſe of another ſpecies, 6 *Co. Rep.* 13. *b.* but then by the ſame reaſon a pardon of *murder* does not include a pardon of *petit treaſon*, nor can one guilty of *petit treaſon* be indicted of *murder*. See *Rex* verſus *Criſpe*, *State Tr. Vol.* VI. *p.* 224, 225.

that conſpiracy, it is not petit treaſon in the ſervant or wife, becauſe the principal is only murder, and the being only acceſſary, where the principal is but murder, cannot be petit treaſon; but if the wife and a ſervant conſpire the death of the huſband, being his maſter, and the ſervant effect it in the abſence of the wife, it is petit treaſon in the ſervant, and ſhe is acceſſary before to the petit treaſon, and ſhall accordingly be indicted and burnt. *P. 16 Eliz. Dy.* 332. *a.* 40 *Aſſ.* 25.

If the ſervant and a ſtranger, or the wife and a ſtranger conſpire to rob the huſband or maſter, and the ſervant or wife be preſent and hold the candle, [while the huſband or maſter is kild*,] the ſtranger is guilty of murder, and the wife or ſervant guilty of petit treaſon as principal, becauſe preſent. 2 *& 3 P. & M. Dy.* 128. *a.*

So that the ſtatute of 25 *E.* 3. doth not only extend to the party, that actually commits the offenſe, but alſo to thoſe that were procurers, aiders or abetters, *ſcilicet*, if they be preſent, they are guilty of petit treaſon as principals, if abſent, yet if the offenſe in the principal be petit treaſon, the offenſe in the acceſſary before is petit treaſon, as acceſſary, as in *Brown's* caſe, *Dy.* 332. *a.*

If a wife or a ſervant intending to poiſon or kill a ſtranger, and miſſing the blow the wife by miſtake kills or poiſons her huſband, or the ſervant his maſter, this, that would have been murder, if it had taken effect againſt the ſtranger, becomes petit treaſon in the death of the huſband or maſter. *Plowd. Com.* 475. *b. Crompt. de pace regis* 20. *b.* and *Dalt. cap.* 91. (*d*); ſo if he ſhoot at *J. S.* and miſſing him kills his maſter. *Ibid.*

If the wife or ſervant conſpire with a ſtranger to kill the huſband or maſter, if the wife or ſervant be in the ſame houſe, where the fact is done, tho not in the ſame room, it is petit treaſon in them, and they are principals in law, becauſe in law adjudged to be preſent, when in the ſame houſe; but if they had been abſent, then they had been only acceſſaries

* Theſe words are not in the *MS.* and the ſenſe plainly requires them, but they are in the caſe cited from *Dyer*,

(*d*) *New Edit. cap.* 142. *p.* 462.

ries before the fact to murder. *Crompt. de pace regis* 21. *a. Blechenden*'s caſe.

If the wife or ſervant command one to beat the huſband or maſter, and he beat him, whereof he dies, if the wife or ſervant be in the ſame houſe, it is petit treaſon in the wife or ſervant as principals, but murder in the ſtranger. *Crompt.* 20. *b. Plowd. Com.* 475. *b.*

For whatſoever will make a man guilty of murder will make a woman guilty of petit treaſon, if committed upon the huſband, or the ſervant, if committed upon the maſter.

Eadem lex mutatis mutandis for an inferior clergyman in relation to his ſuperior.

But now to deſcend to particulars.

I. A ſervant killing his maſter.

Who ſhall be ſaid *a ſervant* or *a maſter*.

If the ſervant kill his miſtreſs or his maſter's wife, this is petit treaſon within this act. 19 *H.* 6. 47. *Plo. Com.* 86. *b. Co. P. C.* 20. 12 *Aſſ.* 30.

If a ſervant, being gone from his maſter, kills him upon a grudge, that he conceived againſt his maſter, while he was in his ſervice, which he attempted while his ſervant, but was diſappointed, it is petit treaſon. 33 *Aſſ.* 7. *Plowd. Com.* 260. *a. Co. P. C.* 20.

If a child live with his father as a ſervant, as if he receive wages from him, or meat and drink for his ſervice, or be bound apprentice to him, and kills his father or mother, this is petit treaſon at this day. (*f*)

But if he receive no wages, nor meat and drink for his ſervice, or be not bound apprentice to him, but only is his ſon and not his ſervant, and kills his father, this was petit treaſon at common law. 21 *E.* 3. 17. *b. per Thorp* (*g*); but the better opinion is, that it is not petit treaſon at this day, becauſe this ſtatute of 25 *E.* 3. ſhall not in this caſe be extended by equity: *quod vide Co. P. C.* 20. *Lambart Juſtic.* 248. *Crompt.* 19. *b.*

II. The

(*f*) 1 *Mar. Daliſon* 14.

(*g*) The book ſays, he was indicted for killing his *mere* (his mother) but *Coke P. C. p.* 20. ſays it is miſprinted, and that it ſhould be read *maiſtre*, (*his maſter*) for mẽr, being abbreviated, (as perhaps it was in the *MS.* of the year-books) may be read either way, tho the laſt ſeems the moſt probable.

II. The wife killing her huſband.

If the huſband kill the wife it is murder, not petit treaſon, becauſe there is ſubjection due from the wife to the huſband, but not *è converſo*.

If the wife be divorced from the huſband *cauſâ adulterii vel ſævitiæ*, ſhe is yet a wife within this law, becauſe this diſſolves not the *vinculum matrimonii* by our law, for they may cohabit again, but otherwiſe it is, if they be divorced *cauſâ conſanguinitatis* or *præcontractûs*, for then the *vinculum* is diſſolved, they are no more huſband and wife.

If *A.* be married to *B.* and during that intermarriage *A.* marries *C.* tho *C.* be as to ſome purpoſes a wife *de facto*, yet ſhe is not a wife within this law, for the ſecond marriage was merely void, tho perchance ſhe may upon circumſtances be a ſervant within the former clauſe, if ſhe cohabit with *A.* and he find her neceſſaries for her ſubſiſtence; *tamen quære*.

III. The clergyman killing his prelate, *&c.*

If a clergyman living and beneficed in the dioceſe of *A.* kill the biſhop of that dioceſe, it is petit treaſon; but if he kill the biſhop of the dioceſe of *B.* it is only murder.

If a clergyman hath a benefice in the dioceſe of *A.* and after by diſpenſation take a benefice in the dioceſe of *B.* if he kill the biſhop of one dioceſe or the other, it is petit treaſon, for he owes and ſwears upon his inſtitution canonical obedience to the biſhop of each dioceſe.

If a clergyman beneficed in the dioceſe of *A.* within the province of *C.* kills his metropolitan, it ſeems it is petit treaſon, tho he be not his immediate ſuperior.

If a clergyman be ordained by the biſhop of *A. in ordinem diaconi, ſive presbyteri ſine titulo*, yet it ſeems if he kills the biſhop it is petit treaſon, for he profeſſeth canonical obedience upon his ordination.

Concerning proceedings in petit treaſon.

In high treaſon all are principals, but in petit treaſon there are principals and acceſſaries, as well before, as after.

If the principal be only murder, as being committed by a ſtranger, the acceſſary cannot be petit treaſon, tho ſhe be a wife or ſervant. *Dy.* 332. *Brown's* caſe *ubi ſupra.*

But if the principal be petit treaſon, as being committed by a wife upon her huſband, or by a ſervant upon his maſter or miſtreſs, if the acceſſary be of the ſame relation, *viz.* a ſervant or wife, the judgment ſhall be given againſt the acceſſary, as in petit treaſon; but if the acceſſary, whether before or after, be a ſtranger, tho ſuch ſtranger be an acceſſary to petit treaſon, yet the judgment ſhall be as in a caſe of felony againſt the acceſſary, *viz. quod ſuſpendatur*, for tho he be an acceſſary to petit treaſon, which is the principal, yet ſuch acceſſary being a ſtranger is not nor can be guilty of petit treaſon, becauſe a ſtranger to the party kild, and neither wife nor ſervant.

At common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. clergy was allowable in caſe of petit treaſon, but not in caſe of high treaſon; but now by the ſtatute of 23 *H.* 8. *cap.* 1. 1 *E.* 6. *cap.* 12. clergy is excluded from petit treaſon, as well as murder, and in the ſame kind.

If a perſon arraigned of high treaſon ſtand wilfully mute, he ſhall be convicted as hath been formerly ſhewn; but if arraigned of petit treaſon, he ſtand mute, he ſhall have judgment of *peine fort & dure. Crompt.* 19. *b. Co. P. C.* 217.

The judgment of a woman convict of petit treaſon is to be burnt (*b*), but (by *Stamf. P. C. fol.* 182. *b.*) in high treaſon to be drawn and burnt, unleſs it be in caſe of coin, and then only to be burnt, as in caſe of petit treaſon.

But the judgment againſt a man convict of petit treaſon is to be drawn and hanged, *trahatur & ſuſpendatur per collum.*

Stamford in *P. C.* 182. tells us, that the execution of drawing is to be upon a hurdle, but 33 *Aſſ.* 7. *Shard* juſtice commanded, that nothing ſhould be brought, whereupon he ſhould be drawn, *mes que ſans cley ou autre choſe a deſouth lui ſoit tray de chivaux hors de la ſale, ou il avoit judgement, tanque a les furc, &c.* but that ſeverity is diſuſed; he is in ſuch caſes drawn upon a hurdle to the place of execution.

And thus far touching petit treaſon.

2 CHAP.

(*b*) The judgment of a woman convict of petit treaſon (or in caſe of coin) is all one as in high treaſon, *viz. to be drawn and burnt. Co. P. C. p.* 211. and ſo is the conſtant practice.

CHAP. XXX.

Concerning hereſy *and* apoſtacy, *and the puniſhment thereof.*

UNder the general name of *hereſy* there hath been in ordinary ſpeech comprehended three ſorts of crimes: 1. *Apoſtacy*, when a chriſtian did apoſtatize to *Paganiſm* or to *Judaiſm*, and the puniſhment hereof, as well by the law of this kingdom, as by the imperial laws, ſeems to have been by death, namely burning. *Bract. Lib.* III. *de coronâ, cap.* 9. (*a*). by the imperial law he was ſubject to loſs of goods, *Cod. de apoſtatis, tit.* 7. *lege* 1. but it appears not, whether he were to ſuffer death, *Ibid. l.* 6. unleſs he ſolicited others to apoſtacy (*b*). 2. *Witchcraft*, *Sortilegium* was by the antient laws of *England* of eccleſiaſtical cognizance, and upon conviction thereof without abjuration, or relapſe after abjuration, was puniſhable with death by writ *de hæretico comburendo, vide Co. P. C. cap.* 6. *& libros ibi, Extr' de hæreticis, cap.* 8. §. 5. *in* 6. 3. *Formal hereſy*; the old popiſh canoniſts define an heretic to be ſuch, *qui malè ſentit vel docet de fide, de corpore Chriſti, de baptiſmate, peccatorum confeſſione, matrimonio, vel aliis ſacramentis eccleſiæ, & generaliter, qui de aliquo prædictorum vel de articulis fidei aliter prædicat, ſentit vel doceat, quam docet ſancta mater eccleſia*; and whereas the antient councils and imperial conſtitutions grounded thereupon kept the buſineſs of hereſy within certain bounds and deſcriptions, as the *Manichees, Neſtorians, Eutychians, &c. quod vide in Codice, Lib.* I. *tit.* 5. *de hæreticis, l.* 5. in the edict of *Theodoſius* and *Valentinian*; the papal canoniſts have by ample and general terms extended hereſy ſo far, and left ſo much in the diſcretion of the ordinary to determine it, that there is ſcarce any the ſmalleſt deviation from them, but it may be reduced to hereſy according to the great generality,

(*a*) *f.* 123. *b.* (*b*) Then it was capital, *Lib.* I. *Cod. tit.* 7. *l.* 5.

rality, latitude, and extent of their definitions and deſcriptions, whereof ſee the gloſs of *Lindwood* in *titulo de Hæreticis, cap.* 1. *Reverendiſſimæ* ad verbum *declarentur*: the definition of *Groſtead*, tho ſomewhat general, is much more reaſonable as we have it given by Mr. *Fox*, *Acts & Mon. part.* 1. *p.* 420. *Eſt ſententia humano ſenſu electa, palàm docta, pertinaciter defenſa*; but of this more hereafter.

In this buſineſs of hereſy, and the puniſhment thereof, I ſhall, as near as I can, uſe this method: 1. I will conſider in general who is the judge of hereſy according to the common and imperial law. 2. Who ſhall be ſaid an heretic according to thoſe laws. 3. What the puniſhment of an heretic is according to thoſe laws: then I ſhall conſider more ſpecially, *viz.* 1. What was the method of the conviction of hereſy according to the antient law uſed in *England* before the times of *Richard* II. and *Henry* IV. And 2. What was the uſual puniſhment of hereſy here in *England* before the time of *Richard* II. and *Henry* IV. 3. I ſhall give an account touching the proceeding againſt heretics from the beginning of *Richard* II. to the twenty-fifth year of king *Henry* VIII. 4. What is the method of proceeding, and how the law touching hereſy, heretics, and their puniſhment from 25 *H.* 8. until the firſt year of queen *Elizabeth*. 5. How the law ſtood from 1 *Eliz.* to this day touching this matter.

I. According to the common and imperial law, and generally by other laws in kingdoms and ſtates, where the canon law obtained, the eccleſiaſtical judge was the judge of hereſies, and hereby they obtained a large juriſdiction touching it, ſo that there was ſcarce any thing, wherein a man diſſented from the doctrine or practice of the *Roman* church, but they took the liberty to determine heretical, *qui à recto tramite, & judicio eccleſiæ catholicæ detectus fuerit deviare, & is qui dubitat de fide catholicâ*, yea even, *qui deſpicit & negligit ſervare ea, quæ Romana eccleſia ſtatuit vel ſervare decreverat: vide Lindwood de hæreticis in cap.* Reverendiſſimæ *ad verbum* declarentur, which left an exceſſive arbitrary latitude in the eccleſiaſtical judge, and a great ſervitude and uncertainty upon men ſubject to their cenſures: the eccleſiaſtical judge was either

ther extraordinary, *viz.* certain inquiſitors thereunto deputed by the pope, or ordinary, which was the biſhop of the dioceſe, as appears by *Lindwood de hæreticis, cap.* finaliter *verb.* ordinarius *in gloſſa*; (*) only for the more ſolemnity of the buſineſs of degradation, which accompanied the ſentence of hereſy upon one in orders, before the offender was left to the ſecular power, there were ſix, but afterwards three biſhops to be preſent in degradation *à ſacris ordinibus, viz.* the epiſcopal, *Preſbyteratus, Diaconatus & ſubdiaconatus*, but *in minoribus ordinibus* there was only required the biſhop and his chapter, *canonici ſive clerici, 6 decretal, cap.* 2. afterward the buſineſs of degradation was reduced to one biſhop, *viz.* the ordinary of the place, ſo far at leaſt as the ſame reſpected the *ordo Presbyteratûs* and inferior orders.

But I do not find, that by the canon or civil law the declaratory ſentente of hereſy was neceſſary in a provincial ſynod, tho in great caſes, eſpecially where a prieſt was to be degraded, it was moſt commonly done in a provincial ſynod, partly for the greater ſolemnity of the buſineſs, and partly becauſe in ſuch ſynods more biſhops and others of the clergy were preſent; but how the uſe was in *England* we ſhall hereafter ſee.

II. As to the ſecond, touching heretics and their diſcriminations according to the canon law, they may be diſtinguiſhed into three ranks: 1. *Simplex hæreticus.* 2. *Hæreticus contumax.* 3. *Hæreticus relapſus.*

1. A ſimple heretic was ſuch, as held an heretical opinion, but being convened before the ordinary, and the opinion being ſubſtantially declared heretical, and the party convicted thereof, declares his penitence and abjures his opinion, in this caſe he was diſmiſſed without farther puniſhment, and this abjuration might be required by the ordinary, and was of two kinds, *viz.* a ſpecial abjuration, whereby he abjured that ſingle heretical opinion, for which he was condemned, or a general abjuration, whereby he renounced all heretical opinions: *vide Lindwood de Hæreticis, cap.* Reverendiſſimæ *verb.* niſi reſipiſcant & abjuraverint in formâ eccleſiæ conſueta: and

(*) See alſo *Lindwood de hæreticis cap.* item quia *verb.* ordinarii.

this abjuration might be required not only of thoſe, that were detected and convicted of hereſy, but even of thoſe, that were *graviter ſuſpecti*; and if they refuſed it, they proceeded to ſentence them as convict: *Extr' de Hæreticis, cap.* ad abolendam.

2. A contumacious heretic was among them of two kinds: 1. Such as refuſed to appear before the ordinary, being accuſed of hereſy, and thereupon were duly excommunicate, and ſo continued excommunicate for one year, *tum velut hæreticus condemnetur*, and was thereupon deliverd or left to the ſecular power, *de hæreticis, cap.* 7. *cum contumaciâ in 6to &c.* 2. Where the party accuſed of hereſy was convict by teſtimony or his own confeſſion, and refuſed to repent and abjure, ſuch a one might thereupon be ſentenced as an heretic, and deliverd over to the ſecular power, but yet he had this favour or privilege, if even after ſuch ſentence he willingly repented and abjured, the ordinary ought to accept thereof, and not deliver him over to the ſecular power, but he was ſpared. *Lindwood de Hæreticis, cap.* Reverendiſſimæ *verb.* reſipiſcant, *& Extr' de Hæreticis, cap.* ad abolend. *verb.* ſponte recurrere; but then the ordinary might detain him in priſon: *vide accordant* 1 *Mar. Br. Hereſy.*

3. A relapſed heretic: and herein they diſtinguiſh between *fictè relapſus, & verè relapſus: Lindwood de Hæreticis cap.* item quia, *verb.* relapſo: 1. The former is where a man is accuſed of hereſy, and is under a great ſuſpicion thereof, but not convicted, only the ordinary puts him to abjure, which accordingly he doth, and afterwards doth entertain, viſit, or comfort heretics, ſuch a perſon by the canon law may be ſentenced as an heretic relapſed, and deliverd over to the ſecular power, but yet the ordinary may, as before, detain him in priſon without actual delivering of him over to the ſecular judge to be executed. *Lindwood ubi ſupra, & in 6to decretal. cap.* 8. *Accuſat' de hæreticis.* 2. *Verè relapſus* is, when a man being convicted of hereſy, and abjuring again falls into hereſy, if he be thereupon convicted and ſentenced, there can be no ſuſpenſion of the ſentence by the ordinary, tho the party repent and conform, but he muſt be deliverd over

to the ſecular power, and the ſentence ought to be given, and is not by any means to be ſuſpended from execution: *6to de Hereticis, cap.* 4.

But this relapſing is of two kinds according to the quality of his abjuration: if the abjuration be general of all hereſies, if he after fall into any hereſy, either that, whereof he was formerly accuſed and convicted, or any other, he is to be ſentenced as a relapſed heretic; but if the abjuration be only ſpecial of that hereſy, whereof he is accuſed, then he is not to be ſentenced, as a relapſed heretic, unleſs he after fall again into the ſame hereſy, which he ſo ſpecially abjured; but herein there is ſome difference among the doctors, for ſome think even after a ſpecial abjuration of one particular hereſy, if he fall into another hereſy, *cenſetur relapſus: vide Extr. de Hæreticis, cap. Acuſat. §. 2. Eum vero in 6to & Lindwood de hæreticis, cap.* Item quia *verbo* ſimpliciter *in gloſſa:* but the ordinary may put this out of queſtion, for it ſeems by the canon law he may at his pleaſure in caſes of hereſy require a general abjuration, *viz. de hæreſi generaliter & ſimpliciter.*

III. Now as to the puniſhment itſelf of hereſy, eſpecially of thoſe, that are either *contumaces,* or *relapſi:* 1. By the civil law; it is true, that the conviction and ſentencing of heretics is as well thereby, as by the canon law, left to the eccleſiaſtical judge, ſo that without a declaration or ſentence of the eccleſiaſtical judge the civil juriſdiction cannot proceed to inflict any puniſhment. *Lindwood de hæreticis, cap.* Reverendiſſimæ *verb.* confiſcata *in gloſſâ,* tho confiſcation of goods of the heretic followed upon his conviction, *neceſſaria tamen eſt ſententia declaratiua judicis ſuper ipſâ confiſcatione, & hæc ſententia fieri ſolummodo debet per judicem eccleſiaſticum, & non per judicem ſecularem: vide in 6to de hæreticis, cap.* ſecundum leges.

But tho the deciſion and judicial ſentence of hereſy was belonging only to the eccleſiaſtical judge, yet the civil conſtitutions of emperors and princes did inſtitute and enact ſeveral penalties, as conſequential upon ſuch ſentence, ſuch as were confiſcation of goods, diſheriſon of heirs, and in ſome caſes death, as we ſhall ſee hereafter: *quod vide in Codice, Lib.* I. *tit.* 5. *de hæreticis per totum.*

As

As to the penalty of death, *ultimum ſupplicium:* it ſhould ſeem the antient imperial conſtitutions made a difference between hereſies in relation to that puniſhment: it appears by the edict of *Theodoſius, Codice, cap.* 4. the *Manichees* and *Donatiſts* were puniſhed with death, and poſſibly ſo were the *Neſtorians, ibidem cap.* 6. and generally all heretics, that ſeduced the orthodox to rebaptization, *ibid. cap.* 23. many other heretics were under milder ſentences, ſome were puniſhed with exile, ſome with extermination from the city, ſome with pecuniary mulcts, and ſome with confiſcation, which, it ſeems, was the moſt uſual puniſhment: but it ſeems, that by the conſtitution of the emperor *Frederic*, (which yet is not extant) *Hodie indiſtincte illi, qui per judicem eccleſiaſticum ſunt damnati de hæreſi, quales ſunt pertinaces & relapſi, qui non petunt miſericordiam ante ſententiam, ſunt damnandi ad mortem per ſeculares poteſtates, & per eas debent comburi ſeu igne cremari. Lindwood de hæreticis, cap.* Reverendiſſimæ *verb.* pœnas; and from this conſtitution of *Frederic* the courſe of burning generally all heretics indiſtinctly, if pertinacious or relapſed, took its riſe.

Now as to the penalties by the canon law, it is true they go no farther than eccleſiaſtical cenſures, injunction of penance, excommunication, and deprivation of eccleſiaſtical benefices; but yet they made bold by ſome of their conſtitutions to proceed farther, and indeed farther than they had authority; ſuch were among others impriſonment by the ordinary, and confiſcation of goods (*c*), but whether they adventured hereupon only in ſubſervience to civil conſtitutions, or whether by their own pretended power, may be doubtful; but howſoever, it is ſo decreed in their canons and conſtitutions: *vide Lindwood de hæreticis cap.* Reverendiſſimæ *verb.* confiſcata, *& ibidem* Item quia *verb.* ſententialiter.

But indeed as to the inflicting of death upon heretics, their canons go not ſo far as that; neither indeed need they, for emperors and princes being induced by them to enact ſuch ſevere conſtitutions, they did in effect the buſineſs by ſentencing the

(*c*) For in *England* before the ſtatute of 2 *H.* 5. *cap.* 7. neither lands nor goods were forfeited by a conviction for hereſy. 3 *Co. Inſtit.* 43.

the heretic, and then leaving him to the ſecular power, ſo that the ſecular power was only in nature of their executioner; and altho they direct in ſome caſes of treaſon an interceſſion to be made to the ſecular power to ſpare the life of the offender thus committed over to the ſectular power, *Extr. de verborum ſignificatione cap.* Novimus, yet we find no ſuch curteſy for heretics, but the princes, that do not effectually proceed according to the utmoſt of their power to eradicate them, are threatned with excommunication, and accordingly they are required to take an oath to perform it, *Extr. de hæreticis cap.* Ad abolendam. (*)

Therefore as to the puniſhment of heretics with death, of an heretic ſo declared by the biſhop, it was left to the ſecular power with this difference, if the perſon convicted were a layman, he was immediately after his ſentence to be deliverd to the ſecular power to be burnt; but if he were a clergyman within the greater or leſſer orders, he was firſt ſolemnly degraded, beginning with the chiefeſt order he had, as that of prieſthood, and ſo to the loweſt, *damnati per eccleſiam judici ſeculari relinquentur animadverſione debita puniendi, clericis a ſuis ordinibus primò degradatis, Extr. de hæreticis, cap.* Excommunicamus; (†) the ſolemnity whereof ſee at large in *6to decretal. de pœnis cap.* Degradatio, *Fox's acts and monuments part* 1. *p.* 674. the degradation of *William Sawtre.*

This degradation by the latter canons might be by one biſhop, tho formerly it required more.

When the ſentence was given by the ordinary, and the offender thus left to the ſecular power, he was deliverd over to the lay-officer, and then a mandate or writ iſſued from the chief magiſtrate to execute the offender according to the ſecular law; but of this more particularly hereafter.

I have been the longer in theſe particulars, that we thereby may obſerve theſe two things: 1. How miſerable the ſervitude of chriſtians was under the papal hierarchy, who uſed ſo arbitrary and unlimited a power to determine what they pleaſed to be hereſy, and then *omni appellatione poſtpoſita* ſubjecting

(*) *Vide Conſtit. Frederici, §. 6.* (†) Vide *Lindwood de hæreticis, cap.* Finaliter *verb.* ſententiet.

jecting mens lives to their ſentence. (*) 2. How finely they made the ſecular power their vaſſals in execution of this odious piece of drudgery, as it was managed and practiſed by them.

I come now to a cloſer conſideration of hereſy, and its puniſhment according to the uſage received in *England*, and the laws relating thereunto, according to the method above propounded.

I. Therefore how the uſage and law obtaind concerning this matter in *England* before the time of *Richard* II.

As the romiſh religion was generally received here in *England* in this period, ſo the manner of proceeding touching hereſy was much according to the papal decretals and conſtitutions, whereof a large account is above given.

The juriſdiction, wherein hereſy was proceeded againſt, was at the common law of two kinds: 1. The convocation or a provincial ſynod. 2. The dioceſan or biſhop of the dioceſe, where the hereſy was publiſhed, and the heretic reſided.

1. As to the former it is without queſtion, that in a convocation of the clergy or provincial ſynod they might and frequently did here in *England* proceed to the ſentencing of heretics, and when convicted, left them to the ſecular power, whereupon the writ of *Hæretico comburendo* might iſſue, (thus it was done in the caſe of the apoſtate *Jew*, *Bract. de Coronâ*, *Lib.* III. (*d*), and in the caſe of *Sawtre* (*e*), 2 *H.* 4. who was convict in the convocation of *London*,) and then the archbiſhop, who was *præſes concilii*, pronounced the ſentence, degraded the offender, if in orders, and ſignified the conviction into chancery, whereupon the writ *de hæretico comburendo* iſſued.

2. As to the power of the biſhop or dioceſan alone there hath been diverſity of opinions; ſome have thought, that the biſhop of the dioceſe might proceed againſt hereſy by eccleſi-

I aſtical

(*) *Godfridus Colonienſis anno* 1234. ſpeaking of the ſeverity of the pope and the emperor *Frederic*, (the author of the conſtitution afore-mentiond for burning heretics) ſays, *Eodem die, quo quis accuſatus eſt ſeu juſtè, ſeu injuſtè, nullius appellationis, nullius defenſionis refugio proficiente, damnatur, & flammis crudeliter injicitur.* See alſo *Mat. Paris*, *p.* 429.

(*d*) *Lib.* III. *cap.* 9. *fol.* 124. *a.*

(*e*) *State Tr. Vol.* VI. *Append. p.* 2. *Fox's Acts and Mon. Vol.* I. *p.* 586. *Rymer's Fœd. Vol.* VIII. *p.* 178.

astical censures, but as to the loss of life the conviction ought to be at least in a provincial council, without which the heretic ought not to undergo death by the writ *de hæretico comburendo*. 1. For that in the case mentiond by *Bracton, Lib.* III. *de Coronâ* the conviction of that heresy, or rather apostacy, whereupon the offender was burnt, was in the provincial council at *Oxford*. 2. The writ *de hæretico comburendo* in the register, and *F. N. B.* recites the conviction to be in a provincial council, and according to it is the opinion of *Fitzherbert, ibidem fol.* 269. and the statute of 2 *H.* 4. (hereafter mentiond) giving power to the ordinary finally to sentence an heretic, so that death should ensue thereupon, was *novæ jurisdictionis in hac parte introducta*. Again, my lord *Coke*, 12 *Rep. p.* 56, 57. recites this to be the opinion of all the judges in 2 *Mar.* and in effect agreed unto 43 *Eliz.* by Sir *John Popham*, and others, 5 *Rep. Cawdrie*'s case, *p.* 23. *a. accordant*, and *Brooke* seems to accord 1 *Mar. Br. Heresy*.

On the other side others have holden, that the diocesan alone by the canon law might convict of heresy, and that thereupon this writ may be issued: 1. This is consonant to the old decretals, and likewise to the provincial constitutions of *Arundel, Courtney* and others, that the diocesan alone without the assistance of a provincial council might convict of heresy, and deliver over the offender to the secular power. 2. Again, the statute of 2 *H.* 4. *cap.* 15. recites and admits the power of the diocesan in this case, but that by reason of the offenders going from diocese to diocese, and refusing to appear before the ordinary, he was interrupted in his proceeding, and thereupon the statute gives farther remedy. 3. That accordingly it was practised in the time of queen *Elizabeth*, when all former statutes concerning heresy were repeald, and the case stood as it was at common law. 4. That it was accordingly resolved by *Fleming, Tanfield, Williams* and *Croke* in 9 *Jac.* (*f*), when *Legate* was burnt for heresy; and accordingly my lord *Coke P. C. cap.* 5. *p.* 40. seems to

(*f*) 12 *Co. Rep.* 92.

to be of the ſame opinion (*g*), and ſo ſeems to retract what he had before deliverd in his 12th report.

This buſineſs will be farther conſiderd in the ſequel of this chapter, for the preſent I ſhall only ſay thus much.

1. That the dioceſan, as to eccleſiaſtical cenſures, may doubtleſs proceed to ſentence hereſy.

2. I think that at common law, and ſo at this day, (all former ſtatutes being now repeald by 1 *Eliz. cap.* 1.) if the dioceſan convict a man of hereſy, and either upon his refuſal to abjure, or upon a relapſe decree him to be deliverd over to the ſecular power, and this be ſignified under the ſeal of the ordinary into the chancery, the king might thereupon by ſpecial warrant command a writ *de hæretico comburendo* (*b*) to iſſue, tho this were a matter that lay in his diſcretion to grant, ſuſpend, or refuſe, as the caſe might be circumſtantiated.

And what is here ſaid of the dioceſan or biſhop of the dioceſe is true alſo of the guardian of the ſpiritualties *ſede vacante*, but till the ſtatute of 2 *H.* 4. the vicar general, commiſſary, or official of the dioceſan had no cognizance, unleſs by ſpecial commiſſion as an inquiſitor from the pope; and *Linwood* gives the reaſon *de hæreticis cap.* Item quia turpis *verb.* ordinarii *in gloſſâ, Eſt enim cauſa hæreſis una de majoribus cauſis, quæ pertinent ad ſolos epiſcopos*; but the ſtatutes of 2 *H.* 4. *cap.* 15. 2 *H.* 5. *cap.* 7. while they were in force, gave the cognizance of hereſy, as well to the biſhop's commiſſary, as the biſhop.

2 3. But

(*g*) Lord *Coke* does not intimate as if he was of this opinion, or had retracted what he had ſaid in his 12th report, (and had been ſolemnly reſolved in *Cawdrie*'s caſe); he ſays indeed, that from the ſtatute of 2 *H.* 4. may be gathered this concluſion, that the dioceſan hath juriſdiction of hereſy, and accordingly it was reſolved in *Legate*'s caſe, and that upon a conviction before the ordinary of hereſy, the writ *de hæretico comburendo* doth lie; this he mentions as alſo reſolved in *Legate*'s caſe, as in truth it was; but to this laſt reſolution he doth not declare any aſſent, for it is the firſt only, which he ſays may be gathered from the act of 2 *H.* 4.

(*b*) Whether this writ lay at common law, or was introduced by the clergy about the time of *Henry* IV. hath been made matter of queſtion: ſee *State Tr. Vol.* II. *p.* [275.] if the common law gave ſuch a writ, it will be difficult to reconcile it with what our author ſays a little below, that the uſual penalty was confiſcation and baniſhment, and that 5 *R.* 2. was the firſt temporal law againſt hereſy, which yet went not ſo high as death, but only to impriſonment and eccleſiaſtical cenſure.

3. But yet I never find before the time of *Richard* II. that any man was put to death upon a bare conviction of hereſy, tho after a relapſe, unleſs he were ſentenced in a provincial council: and the reaſon ſeems to me to be this, when the offender was convicted of hereſy either thro pertinacity, or after a relapſe, and ſo deliver'd over to the ſecular power, the eccleſiaſtical judge had done his buſineſs, and the reſt that follows was to be the act of the temporal or civil power, who were never obliged nor thought themſelves obliged here in *England* to take away the life of a perſon upon ſo ſlender an account, as the judgment of a ſingle biſhop (*i*), nor indeed, unleſs it were a ſentence by the weighty body of a provincial council: *vide Bracton, ubi ſupra.*

For as this kingdom was never obliged by the canons or decretals of popes or of provincial councils further, than they were admitted, ſo neither were they bound by the imperial conſtitutions of the emperor *Frederic* or others, who by their edicts inflict death upon all perſons cenſured by the dioceſan to be relapſed or contumacious heretics; but herein they did as the laws and uſages of the kingdom, and their own prudence, and the circumſtances of the caſe required or directed.

But yet I take it, that the conviction before the dioceſan alone was a good conviction, and the party might thereupon be left to the ſecular power, and ſo burnt by a writ *de hæretico comburendo*, if the king and his council thought fit, tho *de facto* it was not at all, or at leaſt not uſually ſo done, till the time of *Henry* IV. unleſs the conviction and ſentence were in a provincial council, for the reaſon before given.

Fitzherbert therefore was herein miſtaken, and alſo when he ſaith, it was to iſſue only in caſe of relapſe; for a relapſe could not be without conviction, and if the party were thereby convicted of the hereſy, whereof he was accuſed, and perſiſted in it till after ſentence, and refuſed to abjure, ſuch a *contumax* or *pertinax hæreticus* might be proceeded againſt as a relapſed heretic, and a writ *de hæretico comburendo* might thereupon iſſue, as it ſeems, for the writ in the regiſter being formed upon a relapſed heretic purſues the caſe as it finds

(*i*) 12 *Co. Rep.* 56.

it, but is not excluſive of the other caſe of a contumacious heretic, that perſiſts therein before and after the ſentence; *de quo vide ſupra*; *vide accordant* 1 *Mar. Br. Hereſy* 1. and 25 *H.* 8. *cap.* 14.

Touching the penalty of convicts of hereſy here in *England*, I find very rarely death inflicted; before the reign of *Richard* II. the uſual penalty was confiſcation, and ſeizure of goods; *quod vide Clauſ.* 20 *H.* 3. *m.* 11. *dorſ.* touching *Ernald de Peregard*, who was convict of hereſy, and his goods ſeized to the king's uſe; the like, *Clauſ.* 26 *H.* 3. *m.* 15. *pro Stephano Peliter*, and as to corporal puniſhment of ſuch convicts, it was uſually in antient time baniſhment and ſtigmatizing, as appears by *Ralph de Diceto, ſub anno* 1166. in the time of *Henry* II. and *Brompton H.* 2. *ſub anno* 1159. (*), but their conviction was in a provincial council held at *Oxon præſente rege, & præſentibus epiſcopis.*

But *quo jure* the forfeiture of goods was then practiſed, is conſiderable: *vide Co. P. C. cap.* 5. the forfeiture of goods was introduced by 2 *H.* 5. and that ſtatute being repeald, ceaſeth.

And in the firſt temporal law or *pretended* law (*k*) made againſt ſuch offenders, *viz.* 5 *R.* 2. *cap.* 5. where, upon certificate by the prelates into the chancery, commiſſions ſhall iſſue to the ſheriffs to apprehend and impriſon the offender, it is only until they will juſtify themſelves according to the law and reaſon of holy church, ſo that it ſeems the puniſhment did not hitherto *de facto* exceed impriſonment and eccleſiaſtical cenſures; and yet it ſeems that *Swinderby* and others in the time of *Richard* II. before the ſtatute of 2 *H.* 4. were ordered to be executed for hereſy: *vide Fox part* 1. *p.* 580, 618. but none by name appear to be executed, *ibidem p.* 659. but of this hereafter. (†)

As

(*) See alſo *Mat. Paris, p.* 105.

(*k*) Our author here calls it a *pretended law*, and lord *Coke* calls it a *ſuppoſed act*, becauſe the commons never conſented to it, for which reaſon in the next ſeſſion of parliament it was annuld, altho by the prelates means it hath been continually printed, and the act, which annuld the ſame, hath been from time to time kept from the print. 12 *Co. Rep. p.* 57.

(†) It does not appear, that any were orderd to be executed for hereſy in this reign, and as to *Swinderby*, Mr. *Fox* ſays, he was declared an heretic, but ſufferd no great harm during the life of king

As touching the writ *de hæretico comburendo* it was no writ of courſe, nor iſſued by the chancellor, but by ſpecial warrant from the king upon the certificate of the conviction and ſentence made to the king under the ſeal of the archbiſhop, if it were in a provincial council.

And thus far what I find concerning hereſy at common law before the time of *Richard* II.

II. As to the times of *Richard* II. *Henry* IV. *Henry* V. and ſo to 25 *Henry* VIII.

The firſt temporal law or pretended law againſt heretics in this kingdom was 5 *R.* 2. *cap.* 5. which did not go ſo high as death, but only to impriſonment and eccleſiaſtical cenſure, as appears by the printed ſtatute; but this was in truth no act of parliament, for the commons never aſſented; and accordingly *Rot. Parl.* 6 *R.* 2. *n.* 52. the ſame is declared by the king and parliament, which, it is true, was never printed among the ſtatutes, but is at large recited by Mr. *Fox*, *part* 1. *p.* 576. and therefore we find no other puniſhment during this king's time, but impriſonment and eccleſiaſtical cenſures.

But in the time of *Henry* IV. the power of the dioceſan was enlarged, *viz.* by the ſtatute of 2 *H.* 4. *cap.* 15. (*l*), *viz.* the dioceſan hath power given him to arreſt and impriſon perſons ſuſpect of hereſy, till purgation or abjuration, and hath alſo power to fine and impriſon perſons for thoſe offenſes, and eſtreat the fines; and if a perſon be convict of hereſy before the dioceſan and his commiſſaries, and do refuſe to abjure, or having abjured fall into relapſe, ſo that according to the canons he ought to be left to the ſecular court, whereupon credence ſhall be given to the dioceſan or his commiſſaries, then the ſheriff of the ſame county ſhall be perſonally preſent at the preferring of the ſame ſentence, when required by the dioceſan, and ſhall receive the perſon ſentenced, and cauſe him before the people in an high place to be burnt.

This

king *Richard* II. and if he was burnt, it was not till after the ſtatute of 2 *H.* 4. See *Fox's Acts and Mon. p.* 620.

(*l*) This ſtatute was afterwards repeald by 25 *H.* 8. *cap.* 14.

This ſtatute gave in effect the whole power to the dioceſan, and upon this account *William Sawtre* (*m*) after ſentence and degradation in the provincial ſynod of *London* was burnt in the beginning of *Henry* IV.'s uſurpation; the whole proceſs and hiſtory whereof is deliverd by Mr. *Fox* in his acts and monuments, *part* 1. *p.* 674, 675. and yet it is obſervable, this was not done barely by the order of the dioceſan (*n*), but a ſpecial writ *de hæretico comburendo* iſſued to the mayor and ſheriffs of *London* to perform the ſame, which writ is there mentiond *verbatim*, and is the very ſame, which is recited by *F. N. B. fol.* 269. and was the warrant for the burning of *William Sawtre*.

Now touching this matter we are to obſerve, that the parliament of 2 *H.* 4. began the 20th day of *January in octabis Hilarii*, it continued till the 10th of *March* following, *William Sawtre*, having the year before been convicted for hereſy before the biſhop of *Norwich*, was upon the 22d and 24th of *Febr.* 2 *H.* 4. (which was ſitting the parliament) in the provincial council held in St. *Paul*'s, *London*, convicted and ſentenced, as a relapſed heretic, and an heretic to be puniſhed; this was done in the provincial council before *Thomas Arundel*, archbiſhop of *Canterbury*, as appears by the acts of the regiſtry of *Canterbury* collected by Mr. *Fox*, *part* 1. *p.* 673, 674, 675. upon the 26th of *Febr.* the writ *de hæretico comburendo* was formed and made by the advice of the lords temporal in parliament, which writ bears *teſte* 26 *Febr.* 2 *H.* 4. *per ipſum regem & concilium in parliamento*, and is entred *verbatim* in the parliament-roll 2 *H.* 4.

(*m*) He was a pariſh-prieſt, firſt of St. *Margaret* of *Lynn* in the county of *Norfolk*, and afterwards of St. *Sythe*'s church in *Sythe-lane*, *London*, and was the firſt, who appears to have been executed for formal hereſy in *England*.

(*n*) Nor could it be ſo done, becauſe he was not ſentenced by virtue of the act of *H.* 4. which extended only to convictions before the dioceſan or his commiſſary, whereas *Sawtre* was convicted before the convocation; and even on a conviction before the dioceſan the ſheriff had no power to burn the party convict without a writ, unleſs he was preſent at the pronouncing the ſentence, ſee *State Tr. Vol.* VI. *Append. p.* 1. beſides, as our author obſerves below, this act did not paſs till after *Sawtre* was ſentenced, ſo that how it can be ſaid, that it was upon account of this act that *Sawtre* was burnt, I know not, except it be with regard to the encouragement the clergy might take from the proſpect of it's paſſing for anticipating the exerciſe of ſuch a cruel (tho to them deſirable) power.

n. 29. and is the very ſame with that in *Fitzh. N. B.* before mentiond, and agrees *verbatim* with it; and upon this writ *Sawtre* was burnt, being firſt ſolemnly degraded.

This conviction, ſentence, and writ, tho after the commencement of the parliament, was before the end of that parliament, and conſequently before the ſtatute of 2 *H.* 4. *cap.* 15. paſſed, which paſſed not till the laſt day of the parliament, *viz.* 10 *Martii*; ſo that at that time the offender could not be executed but by writ *de hæretico comburendo*, for the dioceſan had not power by his own immediate warrant to command execution, till that paſſed, which paſſed not, till after the definitive ſentence.

In this parliament there was a petition of the clergy againſt heretics, which was the foundation of the ſtatute of 2 *H.* 4. *cap.* 15. and was granted by the king *de conſenſu magnatum & aliorum procerum regni in præſenti parliamento exiſtentium*, with ſome additional clauſes, which were alſo drawn up into the act of 2 *H.* 4. *cap.* 15. but in that anſwer no conſent of the commons appears, and yet the act was drawn up, and proclaimed, and, as it is now printed, is recited to be at the petition of the prelates, clergy and commons of the realm in parliament, and the enacting clauſe is by the king by the aſſent of the ſtates and other diſcreet men of the realm being in the ſaid parliament: this is obſerved by Mr. *Fox* in his *Acts and Monuments*, *part* 1. *p.* 773. whereupon he concludes, that this was no act of parliament, but an act of the king and clergy like that of 5 *R.* 2. before-mentiond, which was declared void, becauſe the commons never aſſented, as is before obſerved.

But the truth is, the commons did aſſent to this act, tho their aſſent be not expreſſed in the parliament-roll as it is entred, as appears in the ſpeech of the ſpeaker of the commons to the king the laſt day of the parliament, *Rot. Parl.* 2 *H.* 4. *n.* 47. where they thank the king for the remedy he had ordained in deſtruction of the heretical doctrine of the ſects; and beſides in the ſame parliament-roll, *n.* 81. " Inter peti-
" tiones communitatis, Item prient les communes, qe quant
" aſcun home ou feme, de qel eſtate ou condition qil ſoit,

" ſoit priſe & impriſone per *Lollardie*, qe maintenant ſoit " meſn en reſpons, et eit tiel judgement, come il ad deſervy " en example dautres de tiel male ſect per ligierment ceſſer " lour malveys predications, & lour tenir al a foy chriſtian. " Ro.' le Roy le voet.

It is true this was never drawn up into a diſtinct act, for the proviſion by the ſtatute of 2 *H.* 4. *cap.* 15. had a full and effectual proviſion for it; but this petition of the commons with the king's aſſent was the principal baſis, upon which the ſtatute of 2 *H.* 4. *cap.* 15. was built, and the ſtatute was drawn up upon both petitions, as well that of the commons, as that of the clergy both put together, as was uſual in thoſe times, and ſo warrants the recital of the preamble of the printed ſtatute of 2 *H.* 4. of the petition both of the clergy and commons (*), and every man knows, that in the times of *Henry* IV. and afterwards the true profeſſors of the chriſtian religion, (that yet for the ſame were ſentenced as heretics,) came under the reproachful title of *Lollards*.

This act of 2 *H.* 4. doth not determine what is hereſy or what not, but leaves it to the deciſion of the dioceſan, which wild and unbounded juriſdiction they had and uſed, till 25 *H.* 8. this therefore was their power at common law, and the temporal judge or power was to give credence herein to their ſentence, but yet the conſequence thereof being but to be left to the ſecular power, the ſecular power might exerciſe his own diſcretion, and grant a writ *de hæretico comburendo*, if he were ſatisfied of the juſtice of the ſentence, or forbear the granting it, if he were not ſatisfied, that the thing charged was a real hereſy, or that the eccleſiaſtical judge had proceeded fairly in the caſe. (†)

But

(*) This petition of the commons amounts to no more, than that the *Lollards* ſhould be cald to an account and puniſhed according to their deſerts, but contains nothing in it, which can be a warrant for ſuch ſevere penalties, as are provided by that act, theſe proceeded from the petition of the clergy.

(†) But by the papal conſtitutions this liberty is not allowd to the ſecular power, for by thoſe conſtitutions it is provided, That the puniſhment of heretics muſt not be relaxed or delayed. *Conſtit. Innoc.* IV. *cap.* 24. and 32. *Clem.* IV. *Conſtit.* XIII. and " That all magiſtrates " under the penalty of excommunication " muſt execute the penalties by the in- " quiſitors impoſed on heretics without " reviſing the juſtice of them, for hereſy " is a crime merely eccleſiaſtical." *Conſtit.* X. *Bull. Rom. Tom.* I. *p.* 453.

But there were ſome points of power introduced by this act, and given to the dioceſan, which he had not at the common law, *viz.*

1. Power to arreſt and impriſon perſons ſuſpect of hereſy, for altho the pope's decretals had before this pretended to give power of impriſonment to the dioceſan, *Extr. de panis, cap.* 3. *in.* 6*to*, yet that power never obtaind in *England*, till this act of 2 *H.* 4.

2. Power to ſet and eſtreat fines upon the offender.

3. Power to deliver over immediately to the temporal officer a relapſed or contumacious heretic to be burnt without expecting the king's writ *de hæretico comburendo*, with this notable advantageous clauſe *whereupon credence ſhall be given to the dioceſan or his commiſſary.*

And accordingly the biſhops after this act put the ſame in ure by their own immediate warrant or order delivering the party to the ſheriff to be executed; but yet the concluſion of their ſentence ran moſt commonly as formerly, *viz.* appointing him to be left to the ſecular power, and ſo leaves him, but ſometimes, as in the definitive ſentence againſt the lord *Cobham*, *Fox*, *part* 1. *p.* 734. *committing him from henceforth to the ſecular power, and judgment to do him thereupon to death.*

Now it is true, that upon the ſentence of the dioceſan the ſheriff or officer, or any other were not to diſpute, whether the ſame were truly hereſy or not. 1. Becauſe it was an act within their cognizance and juriſdiction. 2. Becauſe it is by 2 *H.* 4. enacted, that credence herein ſhall be given to the dioceſan or his commiſſary.

But yet as to the firſt point of the ſtatute, the impriſoning of perſons ſuſpect of hereſy, the temporal judge had cognizance and power to determine, whether that for which the party was impriſoned by the dioceſan were hereſy or not; and if it appeared to the temporal judge not to be hereſy, tho the dioceſan had certified it to be hereſy, the temporal judge might deliver the party impriſond upon an *Habeas Corpus*, as was done *M.* 5 *E.* 4. *Rot.* 143. *B. R.* in *Keyſer's* caſe

caſe (*o*), and the party detaining him is puniſhable in an action of falſe impriſonment, as was done in *Warner*'s caſe (*p*), *M.* 11 *H.* 7. *Rot.* 327. both which caſes are at large reported, *Co. P. C. cap.* 5. *p.* 42. and therefore in caſes of ſuch return upon an *Habeas Corpus*, or juſtification by this act in falſe impriſonment, the particular hereſy muſt be ſet forth, what it is, that the temporal judge may judge, whether it be hereſy or no.

By this ſtatute it appears, 1. That the dioceſan might convict of hereſy, and thereupon the party convict be left to the ſecular power, which ſettles the doubt raiſed by *Fitzh. N. B.* 269. 2. That he might convict an heretic, ſo as to ſubject him to the puniſhment of death not only in caſe of relapſe after abjuration, but alſo in caſe of refuſal to abjure. 3. The power of convicting an heretic is not limited to the dioceſan only, but alſo to his commiſſary in order to his execution by the ſecular power.

After this enſued the ſtatute of 2 *H.* 5. *cap.* 7. againſt heretics and *Lollards*, and thereby it is enacted,

1. "That all temporal officers be ſworn to deſtroy all "hereſies and errors, commonly called *Lollardy*, and that "they be aſſiſting to the ordinary, when required, at the "ordinary's charge.

2. "That when perſons are convict of hereſy, and left "to the ſecular power by the ordinaries or their commiſſa-"ries, their lands in fee-ſimple ſhall after their death be for-"feit to the king or lords, of whom they are held, others "than the ordinaries and commiſſaries themſelves, and all "their goods.

3. "That the juſtices of the king's bench, of the peace, "and aſſiſe, ſhall have power to inquire of ſuch errors and "hereſies called *Lollardy*, and their abetters, *&c.* and make "out proceſs of *Capias* againſt them.

4. "That

3

(*o*) *Keyſer*'s hereſy was, that being excommunicated by the archbiſhop of *Canterbury*; he ſaid, *that notwithſtanding that, he was not excommunicated before God, for his corn yielded as well, as any of his neighbours*, 10 *H.* 7. 17.

(*p*) *Warner*'s hereſy was, that he ſaid *he was not bound to pay tithes to the curate of the pariſh, where he dwelt.* 1 *Rol. Rep.* 110. 3 *Co. Inſtit.* 42.

4. " That ſuch *Lollards* and their indictments be deliverd " over by indenture to the ordinaries or their commiſſaries, " who thereupon are to proceed to their acquittal or con- " viction, but the indictment to be only as an information, " not as evidence againſt the offender, but the ordinaries to " commence their proceſs againſt them, as if there were no " indictment.

5. " Puniſhment for eſcapes is by forfeiture of goods and " ſeizure of lands till he return;" and ſome other proviſions.

This is the firſt law, that gave forfeiture of lands in fee-ſimple of an heretic convict, and executed, and the firſt law, that ſettled the forfeiture of their goods, tho forfeiture of goods were *de facto* uſed before. (*q*)

Tho in ſome reſpects it enlarged the ordinary's power, yet it may ſeem ſome kind of curb upon them to have an indictment previous, yet I find them not reſtrained from proceeding, tho there were no ſuch previous indictment.

Hitherto there was no limitation or reſtraint, what ſhould be or what ſhould not be hereſy, whereupon death might be inflicted, but the ordinary's power was left arbitrary and unlimited therein.

By the ſtatute of 25 *H.* 8. *cap.* 14. there was a great alteration made as to the point of hereſy.

1. The ordinaries were not to proceed againſt any for hereſy without preſentment or indictment thereof before the king's juſtices, or an accuſation by two lawful witneſſes at the leaſt, and that before any citation or proceſs by the ordinary.

2. That perſons convict by the ordinary of hereſy, and refuſing to abjure, or having abjured relapſing, ſhall be burnt by the king's writ *de hæretico comburendo* firſt had and obtained for the ſame.

3. Tho it do not poſitively limit what only ſhall be hereſy, yet it enacts what ſhall not be accounted hereſy. 1. Speaking againſt the authority of the pope. 2. Speaking againſt ſpiritual laws made by the authority of the ſee of *Rome* repugnant to the laws of this realm, or the king's prerogative, and indeed it was time to make this proviſion, the papal au-

(*q*) *Ca. P. C.* 43.

thority being now in a great measure taken away by act of parliament.

4. Persons accused of heresy shall and may be letten to bail either by the ordinary, or in their default by two justices of the peace.

IV. By the statute of 31 *H.* 8. *cap.* 14. a further alteration was made touching heresy.

1. Six articles are declared and enacted, 1. That in the sacrament of the altar after consecration there remains no substance of bread and wine, but the substance of Christ. 2. That communion in both kinds is not necessary *ad salutem.* 3. That priests may not marry by the law of God. 4. That vows of chastity ought to be kept by the law of God. 5. That private mass is necessary to be continued. 6. That auricular confession is necessary to be retained and used.

2. That to preach or to declare, or hold opinion against the first article touching transubstantiation shall be adjudged heresy, and the persons convict thereof, their aiders, &c. convicted thereof in the form underwritten shall be adjudged heretics, and suffer death by burning without any benefit of abjuration, sanctuary, or clergy, and shall forfeit his lands to the king, as in case of high treason.

3. That if any openly preach against the last five articles, and be thereof convict or attaint by the laws underwritten, every such offender shall suffer death as a felon without benefit of clergy or sanctuary.

4. That if any person publish or declare his opinion against the five articles last mentiond, he shall for the first offense forfeit his goods, the profits of his lands during his life, and ecclesiastical promotions, and be imprisoned at the king's will, and upon the second conviction shall suffer as a felon without benefit of clergy.

5. The king is empowerd to issue commissions directed to the archbishop or bishop of the diocese, and the chancellor and others, or three of them, whereof the archbishop or bishop, or chancellor to be one, to take information by oath of twelve men, or the testimony of two lawful persons of all heresies, &c.

6. The

6. The ordinaries within their ſeveral juriſdictions to take information of hereſies, and juſtices of peace, *&c.* to take inquiſitions touching hereſies; theſe informations and inquiſitions to be certified to the commiſſioners above-mentiond.

7. The commiſſioners or any three of them to make proceſs againſt the offenders into all the ſhires of *England* and *Wales*, as in caſe of felony, and upon their appearance ſhall have full power and authority to hear and determine the ſaid offenſes according to the laws of this realm and this ſtatute.

8. Commiſſioners or two of them have power to bail perſons accuſed, till trial.

9. No challenge to be admitted but for malice or enmity, trial of forein pleas by the commiſſioners, no eſchetes to the lords, with ſome other clauſes.

This act, tho it doth not in expreſs terms repeal the ſtatute of 2 *H.* 5. yet it doth in a great meaſure alter it. 1. In point of juriſdiction, for here the proceeding to judgment is to be by commiſſioners under the great ſeal, and not by the ordinary or eccleſiaſtical juriſdiction. 2. The offenſe of hereſy now in a great meaſure is made a ſecular offenſe, eſpecially in the five laſt articles, which are made felony. 3. Tho the commiſſioners have power to proceed upon accuſations, as well as indictment, yet the trial of the offender was to be by jury, and the words *hear* and *determine*, *&c.* import the ſame.

Thus the law ſtood until 1 *E.* 6. with ſome ſmall variations in 34 *&* 35 *H.* 8. *cap.* 1. but by the ſtatute of 1 *E.* 6. *cap.* 12. all the before-mentiond ſtatutes, *viz.* 5 *R.* 2. 2 *H.* 4. 2 *H.* 5. 25 *H.* 8. 31 *H.* 8. 35 *H.* 8. and all other ſtatutes made in the time of *Henry* VIII. concerning religion are repeald. (*r*)

By the ſtatute of 1 *&* 2 *P.* *&* *M.* *cap.* 6. the ſtatutes of 5 *R.* 2. 2 *H.* 4. and 2 *H.* 5. are revived; but the ſtatutes in *Henry* VIII.'s times, repeald by 1 *E.* 6. ſtood ſtill repeald, and thus

(*r*) So that the puniſhment of hereſy then ſtood as it was at common law before any ſtatute made againſt it, notwithſtanding which there were ſome examples in this reign of perſons burnt for hereſy, *viz.* *Joan Bocher* and *George van Parre*, who were put to death much againſt the will of that good king by the over-perſuaſion of archbiſhop *Cranmer*, for which reaſon (as biſhop *Burnet* remarks) what that archbiſhop afterwards ſuffered in the ſucceeding reign was thought a juſt retaliation on him. *Burnet's Hiſt. of Reformation, Vol.* II. *p.* 112.

thus they continued till 1 *Eliz.* and if there had needed any farther repeal of the ſtatutes of 25 and 31 *H.* 8. beſides what was done by 1 *E.* 6. yet the ſtatute of 1 & 2 *P.* & *M. cap.* 8. *in fine* hath this clauſe, that was never repeald by the ſtatute of 1 *Eliz.* nor any other ſtatute ſince made, *viz.* "That the "eccleſiaſtical juriſdiction of archbiſhops, biſhops and ordina-"ries be in the ſame ſtate for proceſs of ſuits, puniſhments "of crimes, and execution of cenſures of the church, with "knowledge of cauſes belonging to the ſame, and as large in "theſe points as the ſaid juriſdiction was in the 20th year of "*Henry* VIII." which doubtleſs repeald all acts made between 20 *H.* 8. and 1 & 2 *P.* & *M.* in derogation or alteration of the eccleſiaſtical juriſdiction, or the ſtyles or forms of their proceeding by *Henry* VIII. or *Edward* VI.

V. I come now to the time of queen *Elizabeth.*

By the act of 1 *Eliz. cap.* 1. there are theſe alterations: 1. The ſtatutes of 1 & 2 *P.* & *M. cap.* 6. 5 *R.* 2. 2 *H.* 4. 2 *H.* 5. are repeald, ſo that now the whole juriſdiction touching hereſy ſtands as it did at common law, with ſuch farther additions as are made by that ſtatute of 1 *Eliz.* 2. The queen, her heirs and ſucceſſors to have power to iſſue commiſſions under the great ſeal to exerciſe all juriſdictions ſpiritual and eccleſiaſtical within this kingdom, and to viſit, reform, redreſs, order, correct, and amend all errors, hereſies, ſchiſms, &c. which by any ſpiritual or eccleſiaſtical power can or may be lawfully reformed. 3. That ſuch commiſſioners ſhall not have power to determine any matter to be hereſy, but only ſuch as have been heretofore determined to be hereſy: 1. By the authority of the canonical ſcriptures. 2. Or by any of the firſt four general councils, or any other general council, wherein the ſame was declared hereſy by the expreſs and plain words of the ſaid canonical ſcriptures. 3. Or ſuch as ſhall hereafter be determined hereſy by parliament with the aſſent of the clergy in their convocation.

Upon this ſtatute theſe things are obſervable:

1. By this ſtatute the antient common law was revived for the conviction of heretics, and delivering them over to the ſecular power, which might at common law be done either

ther in a provincial council, or by the dioceſan alone, and accordingly, it is ſaid *Co. P. C. cap.* 5. (*ſ*) the conviction of heretics was practiſed in the queen's time, but I find no particular inſtance thereof in the queen's time (*t*), but in the caſe of *Legat*, 9 *Jac.* it was ſo reſolved by four judges, and accordingly put in ure, and upon ſuch a conviction before the dioceſan a writ *de hæretico comburendo* might and did iſſue in the caſes of *Legat* and *Wightman* convict of *Arianiſm* before the dioceſan, and left to the ſecular power, who were accordingly burnt (*u*): *vide Baker's Chronicle, p.* 446.

2. There was another method of conviction of hereſy, and thereupon delivering over to the ſecular power, and execution of the offender by writ *de hæretico comburendo*, namely by ſentence of the commiſſioners for eccleſiaſtical cauſes inſtituted by the ſtatute of 1 *Eliz.* but this takes not away the conviction of hereſy by the dioceſan or in a provincial council, but theſe remain as they did at common law; and thus it was done 17 *Eliz.* upon *John Peters* and *Henry Dirwert* (*x*), *Flemings*, convict of hereſy before the commiſſioners for *Anabaptiſm*, and thereupon a writ *de hæretico comburendo* iſſued.

3. That this act reſtored the iſſuing of a writ *de hæretico comburendo* (*y*) according to the courſe of the common law againſt a man convict of hereſy, and refuſing to abjure, or having abjured relapſed, and thereupon deliverd to the ſecular power.

And *note*, that this writ is no writ of courſe, nor can the chancellor or keeper iſſue this writ upon a *ſignificavit* by the commiſſioners or dioceſan without a ſpecial warrant, for that the king may ſee cauſe to ſuſpend the iſſuing thereof, or wholly ſuperſede it, or pardon the ſentence, for it may ſo fall out, that the dioceſan hath adjudged a thing to be he-

(*ſ*) *p.* 40.

(*t*) That is of a conviction in a provincial council, or before the dioceſan alone, for of convictions before the commiſſioners ſome inſtances are here mentiond by our author.

(*u*) But yet ought not to have been ſo by law, according to the opinion of lord *Coke*, for that the ſtatute of 2 *H.* 4. *cap.* 15. which gave the writ *de hæretico comburendo* was repeald, and at common law no ſuch writ lay upon a conviction by the ordinary, 5 *Co. Rep.* 23. *a.* 12 *Co. Rep.* 56, 92.

(*x*) Their names were *John Wielmacker* and *Hendrick Ter Woort.*

(*y*) The act ſays nothing about this writ one way or other, but only repeals the ſeveral ſtatutes relating to hereſy, and ſo leaves the matter, as it was at common law.

reſy, or a party to be an heretic, which in truth and reality is not ſo, or it may be the party may retract, and ſo be capable of mercy.

But the courſe was for the dioceſan alone, if the conviction were ſingly before him, or for the dioceſan with the conſent of the commiſſioners, if the conviction were before them, by *ſignificavit* under the ſeal of the dioceſan to return the conviction into the chancery, and then the ſame is brought before the king and his council, and after deliberation by the king with his council a ſpecial warrant iſſues from the king, by the advice of his council, to the chancellor or keeper, together with the tenor of the writ *de hæretico tomburendo* expreſſed in the warrant, and commanding the chancellor or keeper to iſſue it under the great ſeal, which warrant is filed for the keeper's indemnity: this was the form which was uſed 17 *Eliz.* in the caſe of the *Anabaptiſts* above-named; and *note*, altho the conviction were before the commiſſioners, yet the dioceſan was one of the commiſſioners, and his ſeal to the *ſignificavit*, ſo that there were the junctures of both authorities, *viz.* the authority of the dioceſan according to the courſe of the common law, and of the commiſſioners according to the power given by the ſtatute of 1 *Eliz.* and we have reaſon to believe, that the ſubſequent convictions in the queen's time purſued this form, and poſſibly that of *Legat*'s in 9 *Jac.* might be in the ſame nature, tho the reſolution of the judges, upon which it ſeems the proceſs was formed, takes notice only of the dioceſan.

4. That the forfeiture of goods or lands by conviction of hereſy is by this act repeald.

5. Here is the firſt boundary, that was ſet to the extent of hereſy as to the matter thereof, what only ſhall be adjudged hereſy (z); and altho this clauſe refer expreſly only to the commiſſioners, yet it is to be the meaſure and rule for dioceſans, and the convictions in their proceedings againſt heretics.

But

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(z) And great cauſe there was for this limitation, as appears from the fore-mentiond caſes of *Keyſer* and *Warner*, and others, 12 *Co. Rep.* 58. altho, as our author ſays, there ſtill is too great a latitude left, ſince it is unavoidable, but different interpretations will in many caſes be put even upon ſcripture, ſo long as the uſe of reaſon and liberty of thought continues.

But it is true, it is not ſo particular and certain, as might have been wiſhed, for according to the inclination of the judge poſſibly ſome would determine that to be hereſy by the canonical ſcriptures, which poſſibly is not at all hereſy, nor contrary to the canonical ſcriptures; but howſoever it brought hereſy to a greater certainty than before.

Upon this ſtatute of 1 *Eliz.* theſe things ſeem to me to be true: 1. That the *ſignificavit* of the conviction of hereſy ought to contain, even at common law, the particular hereſy, whereof the party was convict, and without ſuch particular *ſignificavit* no writ *de hæretico comburendo* ought to iſſue; and the reaſons are, 1. Becauſe it concerns the higheſt temporal intereſt, that any man can have, namely his life, and for this reaſon even in ſmaller temporal concerns a general cauſe or return of hereſy or criminouſneſs is not ſufficient; it is not a ſufficient cauſe of refuſal or non-admiſſion of a clerk to allege, that he is *criminoſus & non idoneus*, or that he is *ſchiſmaticus inveteratus.* 5 *Co. Rep.* 58. *a. Specot*'s caſe, and the reaſon is very well given, *coment que nappent al court la royene a determiner ſchiſmes ou hereſies, uncore l'original cauſe del ſuit eſteant matter, dont le court le roy ad conuſans, le cauſe del ſchiſme ou hereſie, purque le preſentee eſt refuſe, coviens eſtre alledge en certain al entent le court le roy poit conſult ove divines a ſcaver, ſi ceo ſoit ſchiſme ou nemy*; and upon the ſame reaſon it is, that in *Keyſer*'s caſe upon an *Habeas Corpus*, and *Warner*'s caſe upon a falſe impriſonment, that, altho the ſtatute of 2 *H.* 4. enable the ordinary to arreſt for hereſy, it is not a ſufficient return or juſtification to ſay the party was an heretic, or ſuſpect of hereſy, but he muſt return the particular hereſy, for which he was ſo arreſted, that the court may judge upon it; and tho the temporal court hath no original cognizance of hereſy, yet it being incident to a temporal intereſt, namely the liberty of a man's perſon, the temporal court ſhall judge, whether it be hereſy or no (*); and accordingly in thoſe caſes they did adjudge

(*) This is certainly agreeable to the law of the land, 2 *Co. Inſtit.* 615, 623. altho it be what the clergy have always diſreliſhed, who never liked to ſubmit their proceedings to the judgment of the king's courts, or of any authority but what was eccleſiaſtical, accordingly we find a decree of *Boniface* V. "Whereby "all powers, lords temporal, and rectors with their officers are forbid to "judge

judge that to be no hereſy, which the biſhop returned as an hereſy, and in the one caſe the priſoner was diſcharged, and in the other caſe recoverd by an action of falſe impriſonment. *Co. P. C. cap.* 5. 2. Altho hereſy be a caſe of eccleſiaſtical cognizance and juriſdiction, and as long as it only concerns eccleſiaſtical cenſures, (and ſo far forth only) faith is to be given to them, 'till reverſed by appeal, yea altho it ſhould in the ſentence itſelf moſt evidently appear, that it was not hereſy, yet as to the inflicting of death at common law they had no power, but all they could do was to commit him to the ſecular power, their buſineſs was then at an end; but now begins the concern of the ſecular power, and herein they were not, as lacqueys, only to follow what the eccleſiaſtical judge had done, for now the life of a ſubject was concerned either to be taken away or not, and that merely by the ſecular power, and herein the ſecular power had a judgment of diſcretion of their own, which they are to exerciſe, but yet cannot do it, unleſs the ſpecial matter of the hereſy be certified to them.

2. Admit a general certificate without ſhewing the particular cauſe of hereſy were good at common law, yet ſince the ſtatute of 1 *Eliz.* it muſt be particular, becauſe an act of parliament, which belongs to the interpretation of the common law, directs what ſhall be hereſy and what not, and the king and his council are to give the warrant for iſſuing the writ, and therefore muſt be aſcertaind, whether it be an hereſy within the deſcription of this act, and the chancellor or keeper of the great ſeal is to affix the ſeal and iſſue the writ, and therefore ought to be ſatisfied by the *ſignificavit*, that it is an hereſy within that act, and if he be not, he is not to ſeal it, for it concerns the life of a ſubject; theſe are not bare

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" judge or take cognizance of hereſy, " it being merely eccleſiaſtical, or to re- " fuſe to execute the puniſhments in- " joined by them, or any way directly or " indirectly to hinder their proceſs or " ſentence under the pain of excommu- " nication, which if they obſtinately lie " under for a year, they are to be con- " demned as heretics;" *Sext. decretal. l.* 5. *tit.* 2. *cap.* Inquiſitionis negotium; this decree is confirmed by the general council of *Conſtance, ſeſſ.* 43. See the conſtitutions of archbiſhop *Boniface, cap.* de impetrantibus prohibitiones, &c. *cap.* de malitia judicis ſecularis, &c. & *cap.* de pœna impedientium, &c. See alſo archbiſhop *Baneroft*'s objections, 2 *Co. Inſtit.* 601, 609, &c. *Codex Leg. Eccleſiaſt. Anglic. p.* 1066. *Pref. to Codex, p.* 19.

bare miniſterial acts by the king and his council or chancellor in ſubſervience to the eccleſiaſtical juriſdiction, but they are acts judicial, where they are to exerciſe both a legal and well warranted diſcretionary judgment, and therefore muſt have the cauſe before them upon the *ſignificavit*, and not by a bare general ſtory of a conviction of hereſy, and therefore if upon the return of the *ſignificavit*, whereby the party is convict and ſentenced either as an obſtinate or relapſed heretic, it ſhall by the particularity of the return appear, that it is not hereſy, there ought no warrant to be granted for the iſſuing of the writ, and if granted, yet the writ ought not to be ſealed, and therefore the certificate or *ſignificavit* muſt be ſpecial and certain. (*)

Again, this definition or circumſcription of hereſy is by an act of parliament, and tho the matter of it, *viz.* *Hereſy*, be of eccleſiaſtical cognizance, yet the interpretation of the act of parliament is of a temporal cognizance, eſpecially where a temporal intereſt, and the greateſt temporal intereſt in the world, namely life, is concerned: we have many acts of parliament, that concern matters of eccleſiaſtical cognizance, as touching clergy and purgation, touching matrimony and the prohibited degrees, yet when theſe acts of parliament come to be expounded, the temporal judge hath the cognizance of them.

The ſtatute of 2 *H.* 4. hath two notable clauſes, one whereby the ordinary hath power to arreſt for hereſy, there is in that clauſe no expreſs proviſion, that credence ſhall be given to the ordinary, and therefore if he arreſt for that, which is not hereſy, the arreſt is unlawful, and as an incident to an intereſt at common law, *viz.* the liberty of the ſubject, the temporal court hath power to determine, whether it be hereſy or not, as is above ſhewn: the other clauſe is a power committed to the ordinary to deliver over the party convict to the ſheriff to be executed without any writ *de hæretico comburendo*. This was introductory of a new law, and therefore the ſheriff or officer might poſſibly ſcruple not

(*) The ſame reaſoning holds in granting the writ *de excommunicato capiendo*, for that, affecting the liberty of a man's perſon, concerns a temporal intereſt.

only whether there were ſuch a ſentence (*a*), but whether the thing, for which the party was condemned as an heretic, were really hereſy; but to avoid all difficulties of this kind this unuſual clauſe is added, *that herein credence ſhall be given to the dioceſan or his commiſſary.*

We are here in the caſe of an act of parliament, an act that introduceth a new circumſcription of hereſy, an act that concerns the life of the ſubject, in a buſineſs, which after the ordinary hath paſſed his ſentence, is now wholly left to the king, who, tho he be ſupreme in matters eccleſiaſtical as well as temporal, yet in the iſſuing of his writ *de hæretico comburendo* is looked upon by the eccleſiaſtical judge, as acting by his ſecular power, for that is the concluſion of the ſentence, *viz. that he be left to the ſecular power*, in this he acts not miniſterially but judicially, and therefore upon all accounts muſt have a certain return of the cauſe of the hereſy, and if it ſhall appear to him, or to the chancellor, that is to ſeal the writ, that the return contains not any certainty of the hereſy, or that, which is returned as an hereſy, be not ſuch as is deſcribed by the ſtatute of 1 *Eliz.* no writ *de hæretico comburendo* ought to iſſue, whether the conviction be by the high commiſſion, or dioceſan, or convocation. (*b*)

(*a*) There could be no room for this ſcruple, becauſe, unleſs the ſheriff was preſent at pronouncing the ſentence, the ordinary had no power by 2 *H.* 4. to deliver the heretic to the ſheriff, nor could the ſheriff proceed to execute him without a writ.

(*b*) Since our author wrote, altho no alteration has been made in the definition of hereſy, which ſtill ſubſiſts upon the foot of the ſtatute of 1 *Eliz.* yet the ſeverer part of the puniſhment is taken away, and the doubt removed, whether the party be liable to a writ *de hæretico comburendo*, for by 29 *Car.* 2. *cap.* 9. this writ and all proceedings thereon, and all capital puniſhments in purſuance of eccleſiaſtical cenſures are utterly aboliſhed and taken away, ſo that hereſy is now puniſhable only with excommunication, (except in the caſe of a clergyman, who is alſo to be deprived and degraded;) the civil effects of which are, that the party excommunicated is diſabled from making a will, *Swinb. of Wills, part* 2. §. 22. or from ſuing for any debt or legacy, *Ibid. part* 5. §. 6. or doing any legal act, *Co. Lit.* 133. *b.* and if the party do not ſubmit within forty days after publication, upon a *ſignificavit* into chancery, there iſſues a writ *de excommunicato capiendo*, by virtue of which he may be arreſted and detained in priſon, till he do ſubmit; ſo that there ſeems now to be no material difference between a ſimple heretic and a relapſed heretic, for excommunication not being a definitive ſentence, but only a proceſs for contempt to inforce obedience to the ſentence, whenever the party complies with it by retracting, doing penance, &c. altho a relapſed heretic, he is to be abſolved.

CHAP. XXXI.

Concerning homicide *and firſt of* ſelf-killing *or* felo de ſe.

HAving gone thro the pleas of the crown touching high treaſon, miſpriſion of treaſon, and petit treaſon, the order that I have propoſed leads me to conſider of felony, *&c.* and theſe are of two kinds, felonies by the common law, and felonies made ſuch by act of parliament.

Felonies by common law are ſuch, as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obſtruction of the execution of juſtice in criminal and capital cauſes, as eſcapes, reſcues, *&c.*

In the firſt place therefore come to be conſiderd thoſe felonies or offenſes, that relate to life or the taking away thereof without due proceſs of law; and this again is either that, which concerns the loſs of life happening to a man's ſelf, or happening to another.

As to the firſt of theſe, namely the conſideration of that offenſe or crime, that concerns a man's own life, where there is no other offender but the ſufferer, this falls under theſe two heads or diviſions.

I. *Homicidium ſui-ipſius*, or felony of a man's ſelf.

II. *Infortunium*, or pure accident, or at leaſt, where no other reaſonable creature is concerned in the effecting of it.

Of the former of theſe in this chapter.

Felo de ſe or *ſuicide* is, where a man of the age of diſcretion, and *compos mentis* voluntarily kills himſelf by ſtabbing, poiſon, or any other way.

No man hath the abſolute intereſt of himſelf, but 1. God almighty hath an intereſt and propriety in him, and therefore

fore ſelf-murder is a ſin againſt God. 2. The king hath an intereſt in him, and therefore the inquiſition in caſe of ſelf-murder is *felonicè & voluntariè ſeipſum interfecit & murderavit contra pacem domini regis.*

Co. Litt. §. 194. *fol.* 127. *a. M.* 11 *Jac. Wright*'s caſe, a man to the intent to make himſelf impotent, and thereby to have the more colour to beg, cauſed another to ſtrike off his hand, for this they were both indicted, fined and ranſomed.

A man or woman as to capital offenſes is *of the age of diſcretion* at fourteen years old: *vide quæ ſupra dicta ſunt cap.* 3.

Compos mentis.

If he loſe his memory by ſickneſs, infirmity, or accident, and kills himſelf he is not *felo de ſe*, neither can he be ſaid to commit murder upon himſelf or any other.

If a man give himſelf a mortal ſtroke, while he is *non compos*, and recovers his underſtanding, and then dies, he is not *felo de ſe*, for tho the death complete the homicide, the act muſt be that, which makes the offenſe.

P. 22 *E.* 3. *Coron.* 244. *Co. P. C.* 54. *vide ſupra cap.* 4. who ſhall be ſaid *non compos.*

It is not every melancholy or hypochondriacal diſtemper, that denominates a man *non compos*, for there are few, who commit this offenſe, but are under ſuch infirmities, but it muſt be ſuch an alienation of mind, that renders them to be madmen or frantic, or deſtitute of the uſe of reaſon: a lunatic killing himſelf in the fit of lunacy is not *felo de ſe*, otherwiſe it is, if it be at another time.

What a *voluntary killing.*

If a man voluntarily give himſelf a mortal wound, and die within a year and a day of that wound, he is *felo de ſe*, and he cannot purge the crime, nor the forfeiture inflicted by the law, by his repenting of what he had done. 8 *E.* 4. 4.

It muſt be ſimply voluntary, and with an intent to kill himſelf.

If *A.* with an intent to prevent a gangrene beginning in his hand doth without any advice cut off his hand, by which

he dies, he is not thereby *felo de ſe*, for tho it was a voluntary act, yet it was not with an intent to kill himſelf.

It is ſaid *Co. P. C. p.* 54. and by Mr. *Dalton*, *cap.* 92. (*a*), that if *A.* gives *B.* a ſtroke, that he falls to the ground, *B.* draws his knife and holds it up for his own defenſe, *A.* in haſte falling upon *B.* to kill him falls upon the knife, whereby he is wounded to death, *A.* is *felo de ſe*, and for that they cite 44 *E.* 3. 44. 44 *Aſſ.* 17. where indeed it is adjudged, and that rightly, that *B.* is not guilty, and ſhall not forfeit his goods, and that it is not barely *ſe defendendo*, for he did not ſtrike, only held up his knife, and ſo is ſimply not guilty; and all that *Knivett* ſays is, *Eſt trove, que le mort occiſe lui meſme*, and adjudged that *B.* is not guilty, nor his goods forfeit: but *Knivett* ſays not, that *A.* is *felo de ſe*, neither indeed is he, but it is only *per infortunium*.

But if *A.* had ſtricken at *B.* with a knife intending to kill him, and miſſing *B.* had ſtricken himſelf, and kild himſelf, there he had been *felo de ſe*, becauſe that act, whereby he intended to murder *B.* ſhall have the ſame conſtruction, if it kill himſelf or any other perſon, as it ſhould have done, if it had taken its effect upon *B. de quo infra.*

Touching the forfeiture of *Felo de ſe.*

He doth not forfeit his lands nor his wife's dower.

But he doth forfeit his goods and chattles.

As to the relation of the forfeiture.

Baron and feme joint purchaſers of a term for years, the huſband drowns himſelf, the leaſe is forfeited, and the wife ſurviving ſhall not hold it againſt the king or almoner, *Plowd. Com.* 260. *b. Dy.* 108. Dame *Hale*'s caſe, in which all the judges agreed, but ſeem to intimate different reaſons: *Weſton* held the relation was only to the death, but the title of the king and a common perſon coming together, the king's title ſhall be preferred, but yet they concluded, that the forfeiture relates to the firſt act, whereby the felony was committed, namely the throwing himſelf into the water, and ſo the king's title commenced in the life of the huſband, and amounted to

(*a*) *New Edit.* 1727. *cap.* 144.

a forfeiture in his life-time, when by law it was in his power either by his diſpoſal or forfeiture, as by outlawry, to bind the intereſt of the wife, and therefore they ſay, that if a villain give himſelf a mortal wound, and the lord ſeize the goods, and then the villain die of the wound, the king ſhall have the goods againſt the lord, and with this agrees *Littleton*, 8 E. 4. 4.

That the law was well reſolved in that caſe I do not doubt, but I am not ſatisfied, that the relation of the forfeiture is to the time of the ſtroke to all purpoſes, no more than in caſe of another felony, for ſuppoſe a man ſhould give himſelf a mortal ſtroke and live eleven months after, how ſhall he ſupport himſelf and his family?

But whereas in other caſes of other felonies the forfeiture as to goods relates neither to the ſtroke, nor to the death, but to the conviction, here the forfeiture relates not barely to the preſentment or inquiſition, but to the death in caſe of a *felo de ſe*, for being his own executioner he prevents any formal conviction, as in other felonies.

But yet in order to this forfeiture it is neceſſary, that there ſhould be a record to entitle the king, *viz.* an inquiſition.

Inquiſitions therefore in this caſe are of two kinds, *viz.* if the body cannot be ſeen, then it is inquiſible before the juſtices of *oyer* and *terminer*, yea or before the juſtices of peace of the county, for it is a felony, and within the extent of their commiſſion, *H.* 37 *Eliz. B. R. Laughton's* caſe, *Co. P. C. p.* 55. (*b*), and accordingly adjudged *M.* 1656. in *Greeve's* caſe.

And ſo if an indictment of felony be before commiſſioners of *oyer* and *terminer* or gaol-delivery, *&c.* and a *fugam fecit* be preſented, if proceſs be made againſt thoſe, that have the goods, the flight may be traverſed, for it is but an inqueſt of office, and ſhall not conclude. 47 *E.* 3. 26.

But it is there held, that if an inquiſition be taken before the coroner *ſuper viſum corporis*, that a man is *felo de ſe*, that inquiſition ſhall be concluſive, and is not traverſable by the executors or adminiſtrators of the deceaſed, *Co. P. C. p.* 55. and the

(*b*) *In Margine.*

the like ſeems to be held by *Stamford*, P. C. *p.* 183. *b.* where a *fugam fecit* is preſented before the coroner *ſuper viſum corporis*, where it is found, that a murder was committed, and the murderer fled; and yet the offender himſelf ſhall be received to plead not guilty to the indictment or inquiſition before the coroner, as by daily experience it appears, tho *Stamford* makes it there a queſtion whether the *fugam fecit* be traverſable.

And therefore I remember in the king's bench in the caſe of *Barclay* it was ruled, that in caſe of an inqueſt before the coroner *ſuper viſum corporis*, wherein the party was found *felo de ſe*, the inquiſition was quaſhed in the king's bench, becauſe upon examination it appeared, that the coroner refuſed to let the jury hear witneſs on the part of him, that was dead, to prove that he was not *felo de ſe*, for the coroner ought to hear evidence on both ſides, partly becauſe it was doubted, that the inquiſition in this caſe was concluſive, and a conviction, and not traverſable, and the court of king's bench, who are the ſovereign coroner, did ſet aſide that inquiſition, and order the coroner to inquire *de novo ſuper viſum corporis*, becauſe the body was yet to be viewed. *H.* 1658. *B. R. Barclay*'s caſe. (*c*)

If an inquiſition be taken before the coroner *ſuper viſum corporis*, whereby the party dead is found to have died *per infortunium*, if it is ſuggeſted on the part of the king or almoner, that he was *felo de ſe*, and in the king's bench a writ of *melius inquirendum* is prayed to the ſheriff, it ſeems it ought not to be granted, becauſe the coroner is the proper officer, and accordingly it was denied in *Paſch.* 24 *Car.* 2. and if granted and an inquiſition taken, it hath been held void (*d*) by the ſtatute of 28 *E.* 3. *cap.* 9. tho many precedents of ſuch writs are extant. *H.* 37 *Eliz. B. R. Croke*, *n.* 13. *Hurleſton*'s caſe, *F. N. B.* 144, 250. (*e*)

But it ſeems, if the coroner's inquiſition omit the finding of the goods of the *felo de ſe*, that may be ſupplied by a writ of *melius inquirendum* directed to the ſheriff, for that is not within the ſtatute of 28 *E.* 3.

But

(*c*) 2 *Sid.* 90, 101. (*d*) 2 *Andr.* 204. (*e*) *Edit.* 1718. *p.* 322, 334.

But whenſoever any inquiſition is taken by the ſheriff by a writ or commiſſion of *melius inquirendum*, without queſtion that inquiſition is traverſable.

If an inquiſition be taken before the coroner *ſuper viſum corporis de villis A. B. C.* and *D.* and ſays not *de quatuor villatis proximè adjacent'*, according to the ſtatute of 4 E. 1. *de coronatoribus* (*f*), yet it hath been held the inquiſition is good, becauſe the ſtatute is only directory. *H.* 1658. *B. R. Barclay's* caſe. (*g*)

But altho an inquiſition taken before the coroner *ſuper viſum corporis* in the point of *felo de ſe* is of great authority and a ſufficient record, whereupon proceſs may be made againſt thoſe, that detain the goods found in the inquiſition, yet it ſeems to me, that it is traverſable in the very point ſo found, for it is but an inqueſt of office, and whereupon the party grieved thereby can have no attaint, but otherwiſe it is of a preſentment of a *fugam fecit* before the coroner. 8 E. 4. 4.

The coroner hath power *ſuper viſum corporis* to inquire touching the murder or interfection of the party that is dead, and alſo of all acceſſaries before, and of their flight, but not of acceſſaries after the fact, 4 *H.* 7. 18. *b.* (*b*), yet the party preſented before the coroner to be principal or acceſſary before is not convict by ſuch preſentment, but ſhall be arraigned and plead to the felony, and I know no difference between that and this; and it ſeems unreaſonable, that by an inqueſt taken againſt a dead perſon, whereby he is found *felo de ſe*, that the executors, adminiſtrators, legatees, and children of the dedeceaſed ſhould be concluded, and loſe the goods of the deceaſed without an anſwer by an inquiſition, which may be taken by the coroner behind their backs, and I find no book expreſs

I

(*f*) This ſtatute was but in affirmance of the common law, *Brit.* 7. *a.*

(*g*) 2 *Sid.* 144. See alſo the *King* verſus *Croſſe*, &c. 1 *Sid.* 204.

(*b*) This caſe ſays nothing directly of the coroner's power to inquire of acceſſaries, yet by reſolving, that in caſe of an acceſſary before the fact preſented before the coroner, if it was found he fled, he ſhould forfeit his goods, but not ſo in caſe of an acceſſary after the fact, it ſeems ſtrongly to imply, that the coroner had juriſdiction in the one caſe, but not in the other; and *Stamford* ſays, that the judges in that caſe of 4 *H.* 7. abridged the coroner of a power, which he would have uſurped in inquiring of thoſe, who were acceſſaries after the murder. See to this purpoſe *Daliſon* 32.

expreſs in it, but the opinion of my lord *Coke P. C.* 55. (*i*), for the doubt of Mr. *Stamford P. C.* 183. is only upon a *fugam fecit*, and in the caſe of *Barclay* 1658. the court of king's bench were not ſatisfied, that it was concluſive.

P. 45 *E.* 3. *inter communia ſcaccarii* there was a preſentment (before the coroner, as it ſeems, but it is not ſo expreſſed in the record) that *Walter Page felonicè ſe ſubmerſit, & ſic felo de ſe devenit*, and thereupon a writ iſſued out of the exchequer to inquire what debts were due to *Walter Page*; the ſheriffs of *London* took an inquiſition, whereby it was found that *Simon Long* of *Eſſex* was indebted to *Walter Page* at the time of his death in 40 *l.* by bill, thereupon proceſs iſſued againſt *Simon Long* to anſwer the debt, who came in and confeſſed he owed the debt to *Walter Page, dicit tamen, quod domino regi reddere non debet, quia qualitercunque præſentatum fuit, quod dictus* Walterus Page *nequiter & felonicè ſe ſubmerſit, ut prædicitur, idem* Walterus Page *interfectus fuit per emulos ſuos, & per ipſos in quodam foſſato in loco vocato* the wilds *in com.* Surrey *projectus, abſque hoc, quod ipſe aliqualiter ſe ſubmerſit*; and thereupon iſſue was joined, and by a jury of *Surrey* found, *quod dictus* Walterus Page *fuit interfectus per emulos ſuos, & in foſſato projectus, abſque hoc, quod ipſe aliqualiter ſe ſubmerſit.*

There a traverſe was taken to the preſentment, which muſt needs be before the coroner by the whole circumſtance of the caſe, tho the coroner be not mentiond in the record.

And with this agrees the book of 8 *E.* 4. 4. that the finding of one to be *felo de ſe* is traverſable, tho found before the coroner; but indeed it holds, that a *fugam fecit* preſented before the coroner is not traverſable, *quia aunſient ley de corone.* (*k*)

If there be two coroners in a county, the outlawry muſt be given by both, *utlagatus eſt per judicium coronatorum*, yet one of them may take an inquiſition *ſuper viſum corporis*, *M.* 6 & 7 *Eliz. C. B.* (*l*)

(*i*) See alſo to the ſame purpoſe *Hob.* 317.

(*k*) See *Stamf. Prereg.* 46. *b.*

(*l*) See *Hob.* 70.

By the ſtatute of 3 *H.* 7. *cap.* 1. the coroner ought to return and certify the inquiſitions taken by him to the next gaol-delivery, or into the king's bench.

And thus far touching *felo de ſe* and his forfeiture.

There is another kind of death of a man, which may be conſiderable in this place, namely the death of a man *per infortunium*, and this is of two kinds, *viz.*

1. Where one man is the cauſe of another man's death without any ill intent, and by misfortune: of this I ſhall treat under the diſtribution of homicide.

2. When a man comes to an untimely end, where no other reaſonable creature concurs to it, and this is properly *per infortunium.*

As where a man falls from an horſe, or houſe, or boat, or into a pit, or a tree or tile fall upon him and kill him, or is kild by a beaſt, in this caſe the coroner ought to take an inquiry *ſuper viſum corporis*, and alſo of the manner and means, how he came by his death, and of the thing, whereby it happend, and of the value thereof, becauſe in many caſes there is a forfeit belonging to the king as a deodand, whereof in the next chapter.

CHAP. XXXII.

Of deodands.

REgularly that moveable good, that brings a man to an untimely death, is forfeit to the king, and it is uſually granted by the king to his almoner to diſtribute in charitable uſes.

But they are not forfeit till the death be found, which is regularly by the coroner, and may be before the commiſſioners of gaol-delivery, *oyer* and *terminer*, or of the peace, if omitted by the coroner, and hence it is, that theſe goods, as neither the goods of felons of themſelves, felons and other outlawed perſons, cannot be claimed by preſcription, becauſe there muſt appear a title to them by matter of record, before they are forfeited.

Upon the death of a man by miſadventure, *&c.* the inquiſition ought to inquire of the goods, that occaſioned the death, and the value of them, and the *Villata*, where the miſchance happend, ſhall be charged with proceſs for the ſaid goods or their value, tho they were not deliverd to them (*a*), 3 *E.* 3. *Cor.* 298.

And this is the reaſon, that in every indictment of murder, manſlaughter, *&c.* the indictment finding, that he was kild with a ſword, ſtaff, *&c.* ought to find alſo the price, *viz.* 5 *ſolidorum*, becauſe the king is intitled to that inſtrument, whereby the party was kild, or the value thereof, and that, altho it were the ſword of another man, and not his, that gave the ſtroke, *Co. P. C.* 57, 58. tho this doth not viciate the indictment as to the offenſe itſelf, tho the price be omitted.

Deodands

(*a*) This caſe is cited from an *Iter* by *Fitzherbert*, who adds at the end of it, *quod mirum.*

Deodands are of two natures: 1. Such as do *movere ad mortem.* 2. Such as, tho they are *quieſcentia*, yet occaſion the party's death: *vide* ſtatute 4 *E.* 1. *de officio coronatoris.*

1. Things moving to death: as if a beaſt kill a man, 8 *E.* 2. *Coron.* 403. if a man be cutting of a tree, and the tree fall upon another tree and break down a limb, which falls upon a man and kills him, both the limb, and the tree that fell, are deodands. 8 *E.* 2. *Coron.* 398.

If a man be driving of a cart, and the cart fall and kill a man, the cart and horſes are a deodand, 8 *E.* 2. *Coron.* 388. and ſo if a cart run over a man and kill him, the cart and horſes are forfeit, 8 *E.* 2. *Coron.* 403. 3 *E.* 3. *Coron.* 326, 342. (*b*), ſo if the timber that hangs a bell fall, and kill a man, the timber and bell are both forfeit. (*c*)

If a man in watering his horſe is drowned, the horſe is a deodand. 8 *E.* 2. *Coron.* 401.

If a man fall into the water, and the water carry him under the wheel of a mill, whereby he is kild, the wheel is forfeited, but not the mill. 8 *E.* 2. *Coron.* 389.

If a weight of earth fall upon a worker in a mine and kill him, the weight of earth is forfeit, not the whole mine. 12 *R.* 2. *Forfeiture* 20.

A man falls from his horſe againſt a trunk, whereof he dies, the horſe is forfeit as a deodand, but not the trunk. 3 *E.* 3. *Coron.* 341.

And yet I find a ſtrong authority, that in that caſe the horſe is not forfeited, unleſs he throw his rider.

Clauſ. 5 *E.* 3. *part* 2. *m.* 9. It was found by inquiſition, "Quod *Willielmus Daventriæ* in parochiâ beatæ *Mariæ Stroud* "in com. *Middleſex*, cum ad-aquavit quendam equum magiſtri "ſui, dictuſque *Willielmus* redeundo de eodem equo per in- "fortunium cecidit, & cum eodem equo per amicos ſuos ſe- "mivivus deductus fuit ad hoſpitium prædicti magiſtri ſui

2 apud

(*b*) A cart met a waggon loaded upon the road, and the cart endeavouring to paſs by the waggon, was driven upon an high bank and over-turned, and threw a perſon, that was in the cart, juſt before the wheels of the waggon, and the waggon ran over him and kild him; it was reſolved in this caſe in the home circuit by *Pollexfen* and *Gregory*, that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved *ad mortem.* 1 *Salk.* 220.

(*c*) 8 *E.* 2. *Corone* 405. *vide contra Rex verſus* Croſſe, &c. 1 *Sid.* 207.

" apud *Fleetſtreet* in ſuburbio *London*, & ibidem languidus " vixit uſque occaſum ſolis, quo tempore obiit ex caſu præ- " dicto; & quod prædictus equus tempore caſûs prædicti per " aliquem vel aliquam non fuit perterritus, per quod habuit " occaſionem recalcitrandi.

This inquiſition being removed into the chancery by *Certiorari*, thereupon it was adjudged *coram rege & concilio, quod equus prædictus tanquam deodand' regi in hoc caſu non debet adjudicari*, and thereupon a writ iſſues to the ſheriffs and coroners of *London* reciting the inquiſition: " Jamque dictâ cer- " tificatione coram nobis & concilio noſtro inſpecta & ple- " nius examinata, nobis & dicto concilio noſtro videtur, " quòd equus prædictus tanquam deodand' nobis in hoc caſu non debet adjudicari," commands the ſheriff and coroners, " quod exactionem, quam *Johanni Bleburgh* (the maſter of the " horſe) vel plegiis, vel manucaptoribus ſuis in hâc parte pro " equo prædicto vel ejus pretio nobis tanquam deodand' red- " dend' feciſtis, ſuperſedeatis omnino, & diſtrictionem in hâc " parte factam ſine dilatione relaxetis." *T. R. apud Guilford* 18 *Novemb.*

Which judgment is of greater weight, than any above cited, and may be a great guide in caſes of this nature, and therefore I have cited it at large: 1. It is a reſolution ſubſequent to all thoſe judgments, that are above-mentiond, for the laſt of them is the 3 *E.* 3. and this is 5 *E.* 3. Again, 2. It is a ſolemn judgment given in chancery *coram rege & concilio* upon great examination, and the whole caſe ſtated in the inquiſition, and every man knows, that underſtands any thing of records of thoſe times, that *coram rege & concilio* was the king's legal council, namely the chancellor, treaſurer, keeper of the privy ſeal, juſtices of the one bench and the other, chancellor and barons of the *Exchequer*: theſe uſually met in chancery upon ſuch occaſions under the ſtyle of *concilium*.

3. It is a judgment given by the king and council *againſt* the forfeiture, the whole caſe appearing upon the inquiſition, which is of greater moment, than a judgment given for the king, becauſe given by himſelf and his officers againſt his own intereſt.

2. Now touching deodands of things not moveable.

If a man be drowned in a pit, tho the pit cannot be forfeited, the coroner may charge the townſhip to ſtop the pit, and make entry thereof in his rolls; and if it be not done before the next *eyre* or gaol-delivery, the townſhip ſhall be amerced. 8 *E.* 2. *Coron.* 416.

If a man falls from an hay-rick, whereby he dies, it is ſaid (*nota*, not adjudged) that it ſhall be forfeit. 3 *E.* 3. *Coron.* 348.

If a man be getting up a cart by the wheel to gather plums, and neither the cart nor horſes moving, the man falls and dies, neither the cart nor horſes are forfeit, but only the wheel. 8 *E.* 2. *Coron.* 409.

It ſeems, that if a man be under the age of fourteen years, and falls from a cart or horſe, it ſhall not be a deodand, becauſe he was not of diſcretion to look to himſelf; but if a horſe, bull, or the like kill him, or if a cart run over him, there it ſhall be a deodand, 8 *E.* 2. *Coron.* 389. *Stamford's P. Cor.* 21. *a. Co. P. C. p.* 57. for there it ſhall be imputed to the neglect of the keeper of the goods, that did the miſchief; and ſo it is, if a tree fall upon one within the age of diſcretion, it is a deodand.

Touching deodands in ſhips or boats, theſe things are obſervable:

1. If a ſhip or boat be laden with merchandize, tho it fall out that a man be kild by the motion of the ſhip or boat, yet the merchandize are no deodand, tho it be in the freſh water; but if any particular merchandize fall upon a party, whereby he dies, that particular merchandize ſhall be a deodand, and not the ſhip. *Britton, cap.* 1. *de office de coroner*, §. 13 & 14.

2. If a ſhip or veſſel be ſailing upon the ſea, and a perſon fall out of the ſhip and is drowned, the ſhip is no deodand.

By the antient conſtitutions of the admiralty it ſeems, that if a man were drowned upon the ſea by falling off from the ſhip under ſail, there was no deodand due, nor if he died by the fall of a maſt or ſail-yard, or otherwiſe; but indeed in the articles of inquiry in the court of admiralty, mentiond in the black book of the admiralty, one of the articles is to in-

quire of them, that take any deodands, beſides the admiral, of any gold, ſilver or jewels found upon any man ſlain upon the ſea, drowned in the ſea, or ſlain with a maſt in the ſhip, or with the yard of the ſhip, or with any other thing, which is the cauſe of the death of any man, that in ſuch caſe *appurtient al admiral per prendre & adminiſtre per l'alme, ce queſt mort, le moiety, & l'autre moiety a doner al ſeme celui, queſt mort, ſes infans, freres au ſoers, ſil ad aucunes:* but certainly this never obtaind, for without queſtion the goods of the deceaſed were no deodands, but only the goods that moved to his death.

Rot. Par. 51 E. 3. *n.* 73. The commons pray, *Que come il ad un cuſtome uſe parmy ceſt realme, que ſi aſcun home ou garſon eſchie hors de aſcun niefe, batelle, ou autre veſſel en le mere, haven, ou autre ewe, & ſoit periſſe, le dit veſſel ad eſtre forfeite au roy, ou autres ſeigneurs de franchiſes,* to the great prejudice of mariners and ſhipping, and therefore pray, *que nul neife, batell, ne autre veſſel ſoit forfeitable deſormes pur le cauſe avant dit.*

Reſp. *En le mere ne doit pas deodand eſtre ajugge, mes quant al ewe freſh le roy ent ferra ſa grace, ou lui pleyſt.*

The like petitions were renewed *Rot. Par.* 1 *H.* 4. *n.* 154. 1 *H.* 5. *n.* 35. 14 *H.* 6. *n.* 26. but they obtaind no other anſwer, than that the law be obſerved.

Yet that anſwer in 51 E. 3. is a ſufficient declaration, that no deodand is to be upon ſuch a death happening upon the ſea, and with this difference touching the forfeiture of a ſhip or other thing, as deodands *in mari & in aquâ dulci*, agrees *Bract. Lib.* III. *cap.* 5. *p.* 122. and *cap.* 17. *p.* 136. *in fine, viz.* that *de ſubmerſis in aquâ dulci batelli, de quibus tales ſubmerſi fuerunt, apprecientur, ſed non in mari, nec ſunt deodanda ex infortunio in mari.*

And with the ſame agrees *Fleta, Lib.* I. *cap.* 25. §. 9. *de ſubmerſis, ſi de molendino ceciderit vel carecta vel de batello, quamvis carcatis, dum tamen in aquâ dulci, ſecus quam in ſalſâ*, and goes farther, but too far, *viz.* that the veſſel with its lading, and the cart with its lading, and the mill, with all that is moveable in it, are deodands.

But

But now, what ſhall be ſaid the ſea or ſalt water?

My lord *Coke*, *ubi ſupra*, *viz. p.* 58. ſaith, and that truly, the arm of the ſea is included herein; and by the book of 22 *Aſſize*, *pl.* 93. ſo far as the ſea flows and reflows is an arm of the ſea.

And thus far of deodands.

I ſhall only add this one thing more relating to the coroner's office touching thoſe, that come to a violent death *de ſubito mortuis*: if the townſhip bury the body before the coroner be ſent for, the townſhip ſhall be amerced; and if the coroner come not to make his inquiry upon notice given, he ſhall be fined in *eyre*, or in the king's bench, or before the juſtices of gaol-delivery.

CHAP. XXXIII.

Of homicide, *and it's ſeveral kinds, and firſt of thoſe conſiderations that are applicable, as well to* murder *as* manſlaughter.

HAving diſpatched the buſineſs of *ſuicidium* or ſelf-murder, and *per infortunium ſimplex*, I come now to conſider of homicide, as it relates to others.

And this is of three kinds: 1. Purely voluntary, *viz.* murder and manſlaughter. 2. Purely involuntary, as that other kind of homicide *per infortunium*. 3. Mixt, partly voluntary, and partly involuntary, or in a kind neceſſary, and this again of two kinds, *viz.* inducing a forfeiture, as *ſe defendendo*, or not inducing a forfeiture, as, 1. In defenſe of a man's houſe. 2. Defenſe of his perſon againſt an aſſault *in viâ regiâ*. 3. In

advancement or execution of juſtice, and according to this diſtribution I ſhall proceed.

I ſhall begin with thoſe matters conſiderable, which are applicable as well to homicide, as to murder.

Murder is a killing of a man *ex malitiâ præcogitatâ*; *homicide* is killing a man without forethought malice.

It is a miſtake in thoſe, that think, that before the ſtatute of *Marlebridge*, *cap.* 26. all killing of a man, tho *per infortunium* or *ſe defendendo*, was murder, for the ſtatute ſaith, that *murdrum de cætero non adjudicetur coram juſticiariis, ubi infortunium tantummodo adjudicatur, ſed locum habet murdrum de interfectis per feloniam tantum, & non aliter*, and therefore they thought that before this ſtatute a man ſhould be hanged for killing another in his own defenſe. 21 *E.* 3. 17. *b.* (*a*)

But the truth is, *murdrum* in this caſe was but an amercement, that was antiently impoſed upon a townſhip, where the death of a man happend (*b*); and this appears by many hundred old charters of the kings of *England*, eſpecially to biſhops and monaſteries, whereby it was granted, that they and their poſſeſſions ſhould be quit *de murdro & latrocinio* among divers other immunities, whereby we muſt not think that they had power granted them to commit murder or theft, but they were thereby acquitted of thoſe common amercements, uſually in thoſe antient times impoſed in *eyre* upon vills for murder and theft committed there.

To make up the crime of homicide or murder there muſt be theſe three concurring circumſtances.

I. The party muſt be kild, antiently indeed a barbarous aſſault with an intent to murder, ſo that the party was left for dead, but yet recoverd again, was adjudged murder, and

(*a*) See alſo 2 *Co. Inſtit. p.* 148. who is of that opinion.

(*b*) This is ſo plain, that it is matter of ſurprize, that any ſhould miſtake it; the word *murdrum* uſually ſignifying a *ſecret* killing of another, ſo that the murderer was not known, for if the murderer was known, it was not in this ſenſe murder; as if the murderer was taken, & *judicium ſuſtinuerit, nullum erit murdrum, quia convincitur felonia*, or if the murderd perſon lived for ſome time after his wounds, it was no murder, becauſe he might diſcover the murderers, the meaning of which is not, that the offender would not in thoſe caſes be liable to be indicted and puniſhed for murder, but that the vill or townſhip would not in ſuch caſes be liable to any amerciament. *Bract. Lib.* III. *de corona, cap.* 15. *p.* 135. *a. Wilk. Leg. Anglo-Sax. p.* 280. *vide ſupra p.* 59. *in notis, vide poſtea cap.* 55. See alſo *Kelyng* 121.

petit treaſon, 15 *E.* 2. *Coron.* 383. but that holds not now, for the ſtroke without the death of the party ſtricken, nor the death without the ſtroke or other violence makes not the homicide or murder, for the death conſummates the crime.

It remains therefore to be conſiderd, to what intents the offenſe of murder or manſlaughter relates to the ſtroke or other cauſe of the death, and to what purpoſes it relates to the death only.

If a man give another a mortal ſtroke, and he lives a month, two or three, or more, and die within the year and day, the title of the lord by eſchete to avoid meſne incumbrances relates to the ſtroke given, and not only to the death. *Plowd. Com.* 263. Dame *Hale*'s caſe.

Foſt. C. L. 65. contra.

If a man give another a mortal ſtroke, and he dies thereof within a year and a day, but meſne between the ſtroke and the death there comes a general pardon, whereby all miſdemeanors are pardoned, this doth pardon the felony conſequentially, becauſe the act, that is the offenſe, is pardoned, tho it be not a felony till the party die. *Ibid.* 401. *Cole*'s caſe.

H. P. C. c. 31. §. 11. 12

If a mortal ſtroke be given on the high ſea, and the party comes to land in *England* and die, the admiral ſhall not have juriſdiction in this caſe to try the felon, becauſe the death, that conſummated the felony, happend upon the land, nor the common law ſhall not try him, becauſe the ſtroke, that made the offenſe, was not *infra corpus comitatus*, 5 *Co. Rep.* 106. *b.* Sir *Henry Conſtable*'s caſe, 2 *Co. Rep.* 93. *a. Bingham*'s caſe, *Co. P. C. p.* 48. and *Lacie*'s caſe 25 *Eliz.* cited there to that purpoſe; *de quo alibi.*

H. P. C. c. 31. §. 13.

At common law, if a man had been ſtricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was, that he might be indicted, where the ſtroke was given, for the death is but a conſequent, and might be found tho in another county. 9 *E.* 4. 48. 7 *H.* 7. 8. and if the party died in another county, the body was removed into the county, where the ſtroke was given, for the coroner to take an inqueſt *ſuper viſum corporis*, 6 *H.* 7. 10. but now by the ſtatute of 2 & 3 *E.* 6. *cap.* 24. the juſtices or coroner of the county,

where the party died, ſhall inquire and proceed, as if the ſtroke had been in the ſame county, where the party died.

On the other ſide, as to ſome reſpects, the law regards the death as the conſummation of the crime, and not merely the ſtroke.

If a party be kild in one county, the coroner *ſuper viſum corporis* might at common law inquire of all acceſſaries or procurers before the fact, tho the procurement were in another county, 20 *H.* 7. *Kelw.* 67. *b. per omnes juſticiarios Angliæ*; but now by the ſtatute of 2 & 3 *E.* 6. *cap.* 24. the indictment and trial of the acceſſaries ſhall be in the county, where they were acceſſary, *viz.* procuring, abetting or receiving.

If a party be mortally wounded, and the offender taken and in the cuſtody of the conſtable, and he ſuffer him to eſcape before the wounded perſon die, it is not felony in the conſtable, tho he die after within the year. 11 *H.* 4. 12. *Plow. Com.* 401. *Cole's* caſe.

If a ſtroke be given the 1ſt of *January*, and the party die the 1ſt of *March* following, the year and day to bring an appeal is to be accounted from the death, and not from the ſtroke, contrary to the opinion of *Stamford P. C.* 63. *a. quod vide Co. P. C. p.* 53. & *ſur ſtatute de Glouc. cap.* 9. (*c*), 4 *Co. Rep.* 42. *b. Haydon's* caſe, *Statut.* 3 *H.* 7. *cap.* 1.

If *A.* give a mortal ſtroke the 1ſt of *January*, and the party lives till the 1ſt of *February*, and then dies of the ſtroke, the concluſion of the indictment is beſt, *Et ſic præfatus* A. *&c. modo & formâ prædictâ interfecit & murdravit*, becauſe it applies to the whole caſe. 2. But if it be, *Et ſic præfatus* A. *prædicto* 1 *Januarii ipſum, &c. interfecit & murdravit*, it is naught, becauſe it is no murder till the party dies, 4 *Co. Rep.* 42. *Haydon's* caſe, *vide ibidem Katharine Hume's* caſe. 3. But if it conclude, *Et ſic præfatus* A. *ipſum, &c. prædicto* 1 *Februarii interfecit & murdravit*, it is good, becauſe then the murder is complete, 4 *Co. Rep.* 47. *a. Wigge's* caſe, tho in ſuch a caſe of a ſtroke at one day or one place, and a death at another day or place, the beſt concluſion, and that which

(*c*) 2 *Co. Inſtit.* 320.

which is in common uſe at this day is, *Et ſic prædictus* A. *ipſum, &c. modo & forma prædictis interfecit & murdravit.*

And thus far touching the relation to the ſtroke or death.

Now what ſhall be ſaid a killing and death within the year and day.

If a man give another a ſtroke, which it may be, is not in itſelf ſo mortal, but that with good care he might be cured, yet if he die of this wound within the year and day, it is homicide or murder, as the caſe is, and ſo it hath been always ruled.

But if the wound or hurt be not mortal, but with ill applications by the party, or thoſe about him, of unwholeſome ſalves or medicines the party dies, if it can clearly appear, that this medicine, and not the wound, was the cauſe of his death, it ſeems it is not homicide, but then that muſt appear clearly and certainly to be ſo.

But if a man receives a wound, which is not in itſelf mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cauſe of his death, yet this is murder or manſlaughter in him, that gave the ſtroke or wound, for that wound, tho it were not the immediate cauſe of his death, yet, if it were the mediate cauſe thereof, and the fever or gangrene was the immediate cauſe of his death, yet the wound was the cauſe of the gangrene or fever, and ſo conſequently is *cauſa cauſati.*

If a man be ſick of ſome ſuch diſeaſe, which poſſibly by courſe of nature would end his life in half a year, and another gives him a wound or hurt, which haſtens his end by irritating and provoking the diſeaſe to operate more violently or ſpeedily, this haſtening of his death ſooner than it would have been is homicide or murder, as the caſe happens, in him, that gives the wound or hurt, for he doth not die ſimply *ex viſitatione dei*, but the hurt that he receives haſtens it, and an offender of ſuch a nature ſhall not apportion his own wrong, and thus I have often heard that learned and wiſe judge juſtice *Rolle* frequently direct.

If a man either by working upon the fancy of another, or poſſibly by harſh or unkind uſage put another into ſuch paſſion of grief or fear, that the party either die ſuddenly, or contract ſome diſeaſe, whereof he dies, tho as the circumſtances of the caſe may be, this may be murder or manſlaughter in the ſight of God, yet *in foro humano* it cannot come under the judgment of felony, becauſe no external act of violence was offerd, whereof the common law can take notice, and ſecret things belong to God; and hence it was, that before the ſtatute of 1 *Jac. cap.* 12. witchcraft or faſcination was not felony, becauſe it wanted a trial, tho ſome conſtitutions of the civil law make it penal.

If a phyſician gives a perſon a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a diſeaſe, and contrary to the expectation of the phyſician it kills him, this is no homicide, and the like of a chirurgeon, 3 *E.* 3. *Coron.* 163. And I hold their opinion to be erroneous, that think, if he be no licenſed chirurgeon or phyſician, that occaſioneth this miſchance, that then it is felony, for phyſic and ſalves were before licenſed phyſicians and chirurgeons; and therefore if they be not licenſed according to the ſtatute of 3 *H.* 8. *cap.* 11. or 14 *H.* 8. *cap.* 5. they are ſubject to the penalties in the ſtatutes, but God forbid that any miſchance of this kind ſhould make any perſon not licenſed guilty of murder or manſlaughter.

Theſe opinions therefore may ſerve to caution ignorant people not to be too buſy in this kind with tampering with phyſic, but are no ſafe rule for a judge or jury to go by: we ſee the ſtatute of 34 & 35 *H.* 8. *cap.* 8. diſpenſeth with the penalty of thoſe former ſtatutes, as to outward applications and medicines for agues, ſtone, or ſtrangury, which may be adminiſterd by any perſon, and the preamble of the ſtatute tells us, that if none but licenſed chirurgeons ſhould be uſed in many caſes, many of the king's ſubjects were like to periſh for want of help.

But if a woman be with child, and any gives her a potion to deſtroy the child within her, and ſhe take it, and it works ſo ſtrongly, that it kills her, this is murder, for it was not

given to cure her of a diſeaſe, but unlawfully to deſtroy her child within her, and therefore he, that gives a potion to this end, muſt take the hazard, and if it kill the mother, it is murder, and ſo ruled before me at the aſſizes at *Bury* in the year 1670.

And certainly if that opinion ſhould obtain, that if one not licenſed a phyſician ſhould be guilty of felony, if his patient miſcarry, we ſhould have many of the poorer ſort of people, eſpecially remote from *London*, die for want of help, leſt their intended helpers might miſcarry.

This doctrine therefore, that if any die under the hand of an unlicenſed phyſician, it is felony, is apochryphal, and fitted, I fear, to gratify and flatter doctors and licentiates in phyſic, tho it may, as I ſaid, have its uſe to make people cautious and wary, how they take upon them too much in this dangerous employment.

If a man have a beaſt, as a bull, cow, horſe or dog, uſed to hurt people, if the owner know not his quality, he is not puniſhable, but if the owner be acquainted with his quality, and keep him not up from doing hurt, and the beaſt kill a man, by the antient *Jewiſh* law (*) the owner was to die for it, *Exod.* xxi. 29. and with this ſeems to agree the book of 3 *E.* 3. *Coron.* 311. *Stamf. P. C.* 17. *a.* wherein theſe things ſeem to be agreeable to law.

1. If the owner have notice of the quality of his beaſt, and it doth any body hurt, he is chargeable with an action for it.

2. Tho he have no particular notice, that he did any ſuch thing before, yet if it be a beaſt, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get looſe and do harm to any perſon, the owner is liable to an action for the damage, and ſo I knew it adjudged in *Andrew Baker*'s caſe, whoſe child was bit by a monkey, that broke his chain and got looſe.

3. And therefore in caſe of ſuch a wild beaſt, or in caſe of a bull or cow, that doth damage, where the owner knows of it, he muſt at his peril keep him up ſafe from doing hurt, for tho he uſe his diligence to keep him up, if he eſcape and do harm, the owner is liable to anſwer damages.

(*) *Vide ſupra p.* 3. *in notis.*

4. But as to the point of felony, if the owner have notice of the quality of the ox, *&c.* and uſe all due diligence to keep him up, yet the ox breaks looſe and kills a man, this is no felony in the owner, but the ox is a deodand.

5. But if he did not uſe that due diligence, but thro negligence the beaſt goes abroad after warning or notice of his condition, and kills a man, I think it is manſlaughter in the owner. *See 2 Black. Comm. 197. 1 H. 6 t. Mann. P. C. 79. 4 C.*

6. But if he did purpoſely let him looſe, or wander abroad with deſign to do miſchief, nay tho it were with deſign only to fright people and make ſport, and it kill a man, it is murder in the owner, and I have heard, that long ſince at the aſſizes held at *St. Albans* for *Hertfordſhire* it was ſo ruled, and the owner hanged for it, but this is but an hearſay.

If a man lay poiſon to kill rats, and a man caſually take it, whereby he is poiſoned, this is no felony, but if a man lay poiſon to the intent that *B.* ſhould take it, to be poiſoned therewith, and *C.* by miſtake takes it, and is poiſoned to death, this is murder, tho it were not intended for him. *Dalt. cap.* 93. (*d*). 9 *Co. Rep.* 81. *b. Agnes Gore's* caſe, *Plowd. Com.* 474. *Saunder's* caſe.

And altho the party take the poiſon himſelf by the perſuaſion of another in the abſence of the perſuader, yet it is a killing by the perſuader, and he is principal in it, tho abſent at the taking of it. 4 *Co. Rep.* 44. *b. Vaux's* caſe.

If *A.* gives poiſon to *B.* intending to poiſon him, and *B.* ignorant of it give it to *C.* a child, or other near relation of *A.* againſt whom he never meant harm, and *C.* takes it and dies, this is murder in *A.* and a poiſoning by him, *Plowd. Com.* 474. *a. Dalt. cap.* 93. but *B.* becauſe ignorant, is not guilty.

If *A.* gives purging comfits to *B.* to make ſport, and not to hurt him, and *B.* dies thereof, it is a killing by *A.* but not murder, but manſlaughter. *Dalt. cap.* 93.

There are ſeveral ways of killing, 1. By expoſing a ſick or weak perſon or infant unto the cold to the intent to deſtroy him, 2 *E.* 3. 18. *b.* whereof he dieth. 2. By laying an impotent perſon abroad, ſo that he may be expoſed to and receive

(*d*) *New Edit.* 1717. *cap.* 143. *f.* 471.

ceive mortal harm, as laying an infant in an orchard, and covering it with leaves, whereby a kite ſtrikes it, and kills it. 5 *Eliz. Crompt. de Pace* 24. *Dalt. cap.* 93. (*e*). 3. By impriſoning a man ſo ſtrictly that he dies, and therefore where any dies in gaol, the coroner ought to be ſent for to inquire of the manner of his death. 4. By ſtarving or famine. 5. By wounding or blows. 6. By poiſoning. 7. By laying noiſome and poiſonous filth at a man's door, to the intent by a poiſonous air to poiſon him, Mr. *Dalton, cap.* 93. out of Mr. *Cook*'s reading. 8. By ſtrangling or ſuffocation.

Moriendi mille figuræ.

A man infected with the plague, having a plague ſore running upon him, goes abroad, this is made felony by the ſtatute of 1 *Jac. cap.* 31. but is now diſcontinued (*f*); but what if ſuch perſon goes abroad to the intent to infect another, and another is thereby infected and dies? whether this be not murder by the common law might be a queſtion, but if no ſuch intention evidently appear, tho *de facto* by his converſation another be infected, it is no felony by the common law, tho it be a great miſdemeanor, and the reaſons are,

1. Becauſe it is hard to diſcern, whether the infection ariſe from the party, or from the contagion of the air, it is God's arrow, and

2. Nature prompts every man, in what condition ſoever, to preſerve himſelf, which cannot be well without mutual converſation.

3. Contagious diſeaſes, as plague, peſtilential fevers, ſmall-pox, *&c.* are common among mankind by the viſitation of God, and the extenſion of capital puniſhments in caſes of this nature would multiply ſevere puniſhments too far, and give too great latitude and looſe to ſevere puniſhments.

II. The ſecond conſideration, that is common both to murder and manſlaughter, is, who ſhall be ſaid a perſon, the killing of whom ſhall be ſaid murder or manſlaughter.

I If

(*e*) *New Edit. cap.* 145. *p.* 469.

(*f*) It was made at firſt to continue no longer, than until the end of the firſt ſeſſion of the next parliament.

If a woman be quick or great with child, if ſhe take, or another give her any potion to make an abortion, or if a man ſtrike her, whereby the child within her is kild, it is not murder nor manſlaughter by the law of *England*, becauſe it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moſes* (*g*) was puniſhable with death, nor can it legally be known, whether it were kild or not, 22 *E.* 3. *Coron.* 263. ſo it is, if after ſuch child were born alive, and baptized, and after die of the ſtroke given to the mother, this is not homicide. 1 *E.* 3. 23. *b. Coron.* 146.

But if a man procure a woman with child to deſtroy her infant, when born, and the child is born, and the woman in purſuance of that procurement kill the infant, this is murder in the mother, and the procurer is acceſſary to murder, if abſent, and this whether the child were baptized or not. 7 *Co. Rep.* 9. *Dyer* 186.

The killing of a man attaint of felony, otherwiſe than in execution of the ſentence by a lawful officer lawfully appointed, is murder or manſlaughter, as the caſe happens, and tho there was ſome doubt, whether the killing of a perſon outlawed of felony were homicide or no, 2 *E.* 3. 6. yet it is homicide in both caſes. 27 *Aſſiz.* 41. *Coron.* 203.

If a perſon be condemned to be hanged, and the ſheriff behead him, this is murder, and the wife may have an appeal. 35 *H.* 6. 58. (*b*)

If a man be attaint in a *præmunire*, whereby he is put out of the king's protection, the killing of him was held not homicide. 24 *H.* 8. *B. Coron.* 197. but the ſtatute of 5 *Eliz. cap.* 1. (*i*) hath now put that out of queſtion declaring it to be unlawful. (*k*)

If a man kill an alien enemy within this kingdom, yet it is felony, unleſs it be in the heat of war, and in the actual exerciſe thereof.

(*g*) *Exod.* xxi. 22.

(*b*) See alſo *Co. P. C.* 52. *quære*, in caſe of treaſon, (where the ſentence is, that the party ſhall be hanged, but not till he be dead, &c.) if the king remit all, but the hanging, whether it be not murder in the ſheriff to hang him till he be dead?

(*i*) *In fine.*

(*k*) See *Coron.* 203. where it is declared felony to kill one outlawed for felony.

III. The third inquiry is, who ſhall be ſaid a perſon killing.

An infant under the age of fourteen years in preſumption of law is ſuppoſed without diſcretion, and therefore *primâ facie* he cannot commit murder or manſlaughter, but being indicted thereof, upon not guilty pleaded he ought to be found not guilty.

But if he be above that age, in preſumption of law he is of diſcretion, and may be guilty.

But if he be under the age of fourteen, yet if upon circumſtances it can appear, that he hath diſcretion, he may be convict of felony. 3 *H.* 7. 1. *b.* 12. *a.* (*l*)

If a man be *non compos mentis*, and kill a man, he is to plead not guilty, and ſhall be acquitted, and is not driven to purchaſe a pardon, tho antiently it was ſo uſed. *Stamford's P. C.* 16. *b.* & *libros ibi.*

And the ſame law it is of a lunatic, that kills a man in the time of his lunacy; but if it be in thoſe intervals, when he hath his underſtanding, then he is a felon, *ſed de his ſupra. p.* 31.

If there be an actual forcing of a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith ſtabs *C.* whereof he dies, this is murder in *A.* but *B.* is not guilty. *Dalt. cap.* 93. *p.* 242. (*m*). *Plowd. Com.* 19. *a.*

But if it be only a moral force, as by threatning, dureſs, or impriſonment, *&c.* this excuſeth not.

A *feme covert* is in law under the coercion of her huſband, and therefore, if ſhe commit larciny or burglary together with her huſband, the huſband is in law guilty, but regularly the wife is not guilty. *Stamf.* 26. *a. Coron.* 160. *Dalt. cap.* 104. *p.* 267. (*n*)

But if ſhe commit murder, or treaſon, or manſlaughter, it is no plea to ſay ſhe did it by coercion of her huſband, but ſhe is guilty, tho committed with her huſband. *Dalt. Ibid.*

(*l*) *Vide ſupra*, *p.* 27. (*m*) *New Edit. cap.* 145. *p.* 473. (*n*) *New Edit. cap.* 157. *p.* 503.

CHAP. XXXIV.

Concerning commanding, counſelling, *or* abetting *of murder or manſlaughter.*

ALtho this title may ſeem more proper under the title of *principal* and *acceſſaries*, yet becauſe it relates to the inquiry, who ſhall be ſaid a murderer or manſlayer, and is common in ſome reſpects to both crimes, I ſhall take up the conſideration thereof here.

He, that counſels, commands, or directs the killing of any perſon, if he be abſent, is an acceſſary to murder before the fact.

In caſe of poiſoning, he that counſels another to give poiſon, if that other doth it, the counſellor, if abſent, is but acceſſary before. *Coke P. C. p.* 49. Sir *Thomas Overbury*'s caſe. (*a*)

But he that actually gives or lays the poiſon to the intent to poiſon, tho he be abſent, when it is taken by the party, yet he is principal, and this was *Weſton*'s caſe (*b*), *Co. P. C. p.* 49. in Sir *Thomas Overbury*'s caſe, and 4 *Co. Rep.* 44. *b. Vaux*'s caſe.

In caſe of murder, he, that counſelled or commanded before the fact, if he be abſent at the time of the fact committed, is acceſſary before the fact, and tho he be in juſtice equally guilty with him, that commits it, yet in law he is but acceſſary before the fact, and not principal.

If *A.* command *B.* to beat *C.* and he beat him ſo that he die thereof, it is murder in *B.* and *A.* if preſent, is alſo guilty of the offenſe, if abſent, he is acceſſary to murder. *Dalt. cap.* 93. (*c*). *Plowd. Com.* 475. *b. Co. P. C. p.* 51. 3 *E.* 3. *Coron.* 314.

If

(*a*) See *State Tr. Vol.* I. *p.* 331. (*b*) *State Tr. Vol.* I. *p.* 313. (*c*) *New Edit. cap.* 145. *p.* 472.

If *A.* counſel *B.* to poiſon his wife, *B.* accordingly obtains poiſon from *A.* and gives it his wife in a roaſted apple, the wife gives it to a child of *B.* not knowing it was poiſon, who eats it and dies, this is murder in *B.* tho he intended nothing to the child. *Plowd. Com.* 474. *Saunder's* caſe: and ſo it is, if an apothecary ſend a potion to the wife, and the huſband mingle poiſon with it, and upon ſome diſlike of the phyſic the apothecary is ſent for, who to juſtify it to be wholeſome voluntarily eats part of it, and is poiſoned and dies, this is murder in *B.* tho the apothecary was never intended to be hurt, but voluntarily took it. 9 *Co. Rep.* 81. *Agnes Gore's* caſe.

But in this caſe, he, who was abſent, and counſelled the poiſoning of the wife, is not acceſſary to the murder, becauſe as to him the command ſhall not be conſtrued further, than as to the perſon intended by him. *Plowd. Com.* 474. *Saunder's* caſe. (*d*)

If *A.* counſel or command *B.* to beat *C.* with a ſmall wand or rod, which could not in all human reaſon cauſe death, if *B.* beat *C.* with a great club, or wound him with a ſword, whereof he dies, it ſeems, that *A.* is not acceſſary, becauſe there was no command of death, nor of any thing, that could probably cauſe death, and *B.* hath varied from the command in ſubſtance, and not in circumſtance.

If *A.* command or counſel *B.* to kill *C.* and before the fact done *A.* repents, and comes to *B.* and expreſly diſcharges him from the fact, and countermands it, if after this countermand *B.* doth it, it is murder in *B.* but *A.* is not acceſſary, but if *A.* repent of it, but before any diſcharge or countermand given to *B.* *B.* kills *C.* yet *A.* remains acceſſary notwithſtanding his private repentance, for in as much as his expreſs counſel or command occaſions the fact, he muſt at his peril ſee, that he countermand *B.* and ſo remedy as much as in him lies the miſchief,

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(*d*) But tho the judges were of opinion in this caſe, that he was not acceſſary, yet they thought it propereſt, that he ſhould be deliverd rather by a pardon, than otherwiſe, and accordingly they kept him in priſon from one ſeſſion till another, till he procured a pardon; and maſter *Plowden*, the reporter, ſays, it was his opinion, that whoever counſels or commands an evil thing, ſhould be adjudged acceſſary to all, which follows from that evil action, but not from any other diſtinct thing.

miſchief, that his former command occaſiond. *Co. P. C. p.* 51. *Plowd. Com.* 476. *a. Saunder*'s caſe.

In manſlaughter there can be no acceſſaries before the fact, for it is preſumed to be ſudden, for if it were with advice, command, or deliberation, it is murder and not manſlaughter, and the like of *ſe defendendo.*

And therefore in an indictment of manſlaughter only, if others be indicted as acceſſaries before the fact, the indictment is void againſt them.

And if *A.* be indicted of murder, and *B.* as acceſſary before by procurement, *&c.* and *A.* is found guilty only of manſlaughter, *B.* ſhall be diſcharged. 4 *Co. Rep.* 43. *b. Goffe* verſus *Bibithe* and *Hoell David.*

And antiently, he that ſtruck the ſtroke, whereof the party died, was only the principal, and thoſe, that were preſent, aiding, and aſſiſting, were but in the nature of acceſſaries, and ſhould not be put upon their trial, till he that gave the ſtroke were attaint by outlawry or judgment. 40 *Aſſ.* 25. 40 *E.* 3. 42. *a.*

But at this day, and long ſince, the law hath been taken otherwiſe, and namely, that all, that are preſent, aiding, and aſſiſting, are equally principal with him, that gave the ſtroke, whereof the party died. 4 *H.* 7. 18. *a. per omnes juſticiarios utriuſque banci*, for tho one gave the ſtroke, yet in interpretation of law it is the ſtroke of every perſon, that was preſent, aiding, and aſſiſting, and tho they are called principals in the ſecond degree, yet they are principals, and the law was alterd herein, *in tempore H.* 4. *Plowd. Com.* 100. *a.* and therefore, if there be an indictment of murder or manſlaughter againſt *A.* that *A. felonicè, &c. percuſſit B.* whereof he died, and that *C.* and *D.* were preſent, abetting, aiding, and aſſiſting to *A. ad feloniam & murdrum &c. modo & formâ prædictâ faciend'*, and *A.* appears not, but *B.* and *C.* appear, they ſhall be arraigned, and receive their judgment if convict, tho *A.* neither appear, nor be outlawed. *Plowd. Com.* 97 and 100. *Gytyn*'s caſe.

If *A.* be indicted as having given the mortal ſtroke, and *B.* and *C.* as preſent, aiding, and aſſiſting, and upon the evidence

it appear, that *B.* gave the ſtroke, and *A.* and *C.* were only aiding and aſſiſting, it maintains the indictment, and judgment ſhall be given againſt them all, for it is only a circumſtantial variance, for in law it is the ſtroke of all, that were preſent, aiding, and abetting. *Plowd. Com.* 98 *a.* 9 *Co. Rep.* 67. *b. Mackally's* caſe.

Yet the circumſtances of the caſe may vary the degree of the offenſe in thoſe, that are in this kind parties to the homicide.

If *A.* have malice againſt *B.* and lies in wait to kill him, and *C.* the ſervant of *A.* being preſent, but not privy to the intent of his maſter, finds his maſter fighting with *B.* takes part with his maſter, and the ſervant or maſter kill *B.* this is murder in *A.* becauſe he had malice forethought, but only homicide in *C.* *Plowd. Com.* 100. *b. Salisbury's* caſe, where it was alſo reſolved, that where *A.* had malice againſt *D.* the maſter of *B.* but by miſtake aſſaults and kills *B.* the ſervant, or having malice againſt *D.* the maſter, and *B.* his ſervant comes in aid of his maſter, and *A.* kills him, it is murder in *A.* as much as if he had kild the maſter, for the malice ſhall be carried over to make the killing of *B.* murder.

Upon an indictment of murder, tho the party upon his trial be acquit of murder, and convict of manſlaughter, he ſhall receive judgment, as if the indictment had been of manſlaughter, for the offenſe in ſubſtance is the ſame.

And upon the ſame reaſon it is in caſe of malice implied, if *A. B.* and *C.* be in a tumult together, and *D.* the conſtable comes to appeaſe the affray, and *A.* knowing him to be the conſtable kill him, and *B.* and *C.* not knowing him to be the conſtable, come in, and finding *A.* and *D.* ſtruggling aſſiſt and abet *A.* in killing the conſtable, this is murder in *A.* but manſlaughter in *B.* and *C.*

To make an abetter to a murder or homicide principal in the felony, there are regularly two things requiſite, 1. He muſt be preſent. 2. He muſt be aiding and abetting *ad feloniam & murdrum ſive homicidium.*

If he were procuring, or abetting, and abſent, he is acceſſary in caſe of murder, and not principal, as hath been ſhewn, unleſs in ſome caſes of poiſoning, *ut ſupra.*

If he be preſent, and not aiding or abetting to the felony, he is neither principal nor acceſſary.

If *A.* and *B.* be fighting, and *C.* a man of full age comes by chance, and is a looker on only, and aſſiſts neither, he is not guilty of murder or homicide, as principal in the ſecond degree, but it is a miſpriſion, for which he ſhall be fined, unleſs he uſe means to apprehend the felon. 8 *E.* 2. *Coron.* 395. 3 *E.* 3. *ibidem* 293. 14 *H.* 7. 31. *b.* *Stamford's* P. C. 40. *b.* *Dalton, cap.* 108. *p.* 284. (*e*)

Therefore it remains to be inquired, 1. Who ſhall be ſaid to be preſent. 2. Who ſhall be ſaid abetting, aiding or aſſiſting to the felony.

I. As to the firſt: if divers perſons come to make an affray, *&c.* and are of the ſame party, and come into the ſame houſe, but are in ſeveral rooms of the ſame houſe, and one be kild in one of the rooms, thoſe that are of that party, and that came for that purpoſe, tho in other rooms of the ſame houſe, ſhall be ſaid to be preſent. *Dalt. cap.* 93. *p.* 241. (*f*)

The lord *Dacre* and divers others came to ſteal deer in the park of one *Pelham*, *Rayden* one of the company kild the keeper in the park, the lord *Dacre* and the reſt of the company being in other parts of the park, it was ruled, that it was murder in them all, and they died for it. *Crompt.* 25. *a.* *Dalt. ubi ſupra,* 34 *H.* 8. *B. Coron.* 172. (*g*).

The like in caſe of burglary, tho ſome ſtood at the lane's end or field-gate to watch if any came to diſturb them, *Co. P. C. p.* 64. 11 *H.* 4. 13. *b.* yet they are ſaid to be burglars, becauſe preſent, aiding, and aſſiſting to the burglary.

II. Who ſhall be ſaid abetting, aiding and aſſiſting.

If *A.* comes and kills a man, and *B.* runs with an intent to be aſſiſting to him, if there ſhould be occaſion, tho *de facto* he doth nothing, yet he is principal being preſent, as well as *A.* 3 *E.* 3. *Coron.* 309. If

(*e*) *New Edit. cap.* 161. *p.* 527. (*f*) *New Edit. cap.* 143. *p.* 472. (*g*) See alſo *Moor* 86. *Kelynge* 56.

If divers come with one aſſent to do miſchief, (*male faire*) as to kill, rob or beat, and one doth it, they are all principals in the felony, *&c.* 3 *E.* 3. *Coron.* 314.

If *A.* and divers others in his company intending to rob a perſon charge him with felony, and as they are carrying him to gaol, ſome of the company rob the perſon attached, this is robbery in all, but if the reſt of the company come without any ſuch intent, it ſeems they are not guilty. 3 *E.* 3. *Coron.* 350.

If *A.* comes in company with *B.* to beat *C.* and *B.* beats *C.* that he die, *A.* is principal, but then, according to thoſe elder times, the indictment muſt not be only, that he was preſent, aiding, and aſſiſting, for that, as the law was then taken, makes him only acceſſary, but the indictment muſt ſhew the ſpecial matter, that they came to that intent, 19 *E.* 2. *Coron.* 433. but now that courſe is alterd, and the indictment only runs, that *A.* was preſent, aiding, and aſſiſting, and that is ſufficient to make him principal.

So if *A.* being preſent command *B.* to kill *C.* and he doth it, both are principals. 13 *H.* 7. 10. *a.* (*b*)

If many be preſent, and one only gives the ſtroke, whereof the party dies, they are all principal, if they came for that purpoſe. 21 *E.* 4. 71. *a.*

The caſe of *Drayton Baſſet* reported by Mr. *Crompton*, *fol.* 28. was this: *A.* with thirty others and more enterd with force upon the manor-houſe of *Drayton Baſſet*, and ejected *B.* his children, and ſervants out of the ſame; afterwards twenty others on the behalf of *B.* three days after, in the night, came with weapons with intent to re-enter, and one of the twenty, about ten of the clock in the night, caſt fire into a thatcht houſe adjoining to the houſe, whereupon one that was in the houſe ſhot off a gun, and kild one of the party of *B.* and then the reſt of the party of *B.* fled, and *A.* and his company continued the forcible poſſeſſion of the houſe for many days after, whereupon *A.* and twenty-ſeven more were indicted of

murder,

(*b*) This caſe was ſomething more, than a bare command, for one held him, while the other kild him; but what our author here ſays is more directly proved by the caſe in 4 *H.* 7. 18. *a.*

murder, and arraigned in the king's bench, and the matter aforeſaid given in evidence againſt him, and *Mich.* 22 & 23 *Eliz.* he was found guilty of manſlaughter, *& divers autres de rioters, que fueront in le meaſon al temps, que ie home fuit tue, fueront arraigns come principals, coment que ne aſſent al ſetter del gunne ne al tuer, purceo que fueront la illoyalment aſſemblies, & in forcible manner gard le meaſon ouc* A. *que fuit convict.*

And conſonant to this is Mr. *Dalton, p.* 241. (*i*) in theſe words: " Note alſo, that if divers perſons come in one com-" pany to do any unlawful thing, as to kill, rob or beat a " man, or to commit a riot, or to do any other treſpaſs, " and one of them in doing thereof kill a man, this ſhall be " adjudged murder in them all, that are preſent of that " party abetting him, and conſenting to the act, or ready to " aid him, altho they did but look on.

A man ſeizeth the goods of a *Frenchman* in time of war, and carries them to his houſe, a ſtranger pretending to be deputy-admiral with a great multitude of men came with force to the houſe, where the goods were, and at the gate of the houſe made an aſſault upon them, that were in the houſe, a woman iſſued out of the houſe without any weapon, and is kild by one of the ſervants, who came to take the goods, by throwing a ſtone at another, that was in the gate, and the perſon, that came to ſeize the goods, ſaid, (before his coming) he would make him *a cokes* that kept the goods, and would make him to know the baſeſt in his houſe. By five judges, two ſerjeants, the queen's attorney, and ſolicitor, it was held, that if it appear, that the woman came in defenſe of the maſter of the houſe, then it was murder in the vice-admiral and all his companions: but by other five judges contrary, for no malice was againſt the woman, and murder ſhall not be extended further, than it was intended, and the former held, that if *A.* and *B.* fight by appointment before-hand, and a ſtranger comes between them to part them, and he is kild by *A.* it is murder in him, and ſome ſaid in both, but the

(*i*) *New Edit. p.* 472.

others *noluerunt ad hoc concordare. Manſell* and *Herbert*'s caſe, *H.* 2 *&* 3 *P. & M. Dyer* 128. *b.*

That point, wherein the judges differd, was, whether the miſtake of the perſon excuſeth it from murder, but it ſeems not queſtiond, but all agreed it manſlaughter, and that not only in him, that gave the blow, but in all the companions of that party: but now the former point is ſufficiently ſettled, that if it had been murder, in caſe the man had been kild, that was meant, it is murder in killing the woman, and that, whether ſhe came as a partizan to *Manſell*, the owner of the houſe, or not, *quod vide ſupra:* and in the laſt caſe put, in *Herbert*'s caſe before, it is certainly murder in him, that kills the man, that comes to part them, and if it had been only a ſudden quarrel, it had been manſlaughter in him, that kills him, and *Dalt. cap.* 93. *p.* 240. (*k*) yea, and if the combating were by malice prepenſe, it is held, that the killing of him, that comes to part them, is murder in both, and both were hanged for it, becauſe each of them had a purpoſe to have kild the other. 22 E. 3. *Corone* 262. *Lambert* out of *Dalliſon*'s report, *p.* 217. but that ſeems to me to be miſtaken, it is not murder in both, unleſs both ſtruck him, that came to part them; and by the book of 22 *Aſſ.* 71. *Coron.* 180. (which ſeems to be the ſame caſe, tho more at large,) he only, that gave the ſtroke, had judgment, and was executed. (*l*)

And therefore it is a miſtake in thoſe, that ſay, if it be not known which of them did it, they ſhall both have judgment, for the jury ought preciſely to inquire, and upon circumſtances to ſatisfy themſelves, whether the one, or the other, or both did it, and neither to acquit, nor convict both, becauſe they know not who did it.

But to return to the aiders and abetters again.

By the caſes of *Drayton Baſſet* and *Herbert* it appears, that if many come to commit a riotous unlawful act, if in the purſuit of that action one of them commit murder or manſlaughter, they are all guilty, that are of that party, that committed

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(*k*) *New Edit. cap.* 145. *p.* 472.

(*l*) The other doth not appear to have been before the court, but upon putting the caſe, the court ſaid, he that ſtruck is guilty of felony, but ſaid nothing as to him, who did not ſtrike.

mitted the diſorder; wherein nevertheleſs theſe things muſt be obſerved.

1. In that caſe it muſt be intended, when one of the ſame party commits the murder or manſlaughter upon one of the other party, or upon thoſe, that came to appeaſe or part them, or by due courſe of law to diſperſe them.

And therefore I have always taken the law to be, that if *A.* and *B.* have a deſign to fight one with another upon premeditation or malice, and *A.* take *C.* for his ſecond, and *B.* take *D.* for his ſecond, *A.* kills *B.* in this caſe *C.* is principal, as preſent, aiding, and abetting, but *D.* is not a principal, becauſe he was of the part of him, that was kild, and yet I know, that ſome have held, that *D.* is principal as well as *C.* becauſe it is a compact, and rely much upon the book of 22 *E.* 3. *Coron.* 262. before-mentiond, but, as I think, the law was ſtraind too far in that caſe, and ſo it is much more in making *D.* a principal in the death of *B.* that was his friend, tho it be, I confeſs, a great miſdemeanor, yet I think it is not murder in *D.*

And the books in all the inſtances of this nature ſay, that it is murder or manſlaughter in that party, that abetted him (*), and conſented to the act, but *D.* never abetted *A.* to kill *B.* but abetted *B.* indeed to have kild *A.*

2. It muſt be a killing in purſuit of that unlawful act, that they were all engaged in, as in the caſe of the lord *Dacre* before-mentiond, they all came with an intent to ſteal the deer, and conſequently the law preſumes they came all with intent to oppoſe all, that ſhould hinder them in that deſign, and conſequently when one kild the keeper, it is preſumed to be the act of all, becauſe purſuant to that intent: but ſuppoſe, that *A. B.* and *C.* and divers others come together to commit a riot, as to ſteal deer, or pull down incloſures, and in their march, upon their deſign, *A.* meets with *D.* or ſome other, with whom he had a former quarrel, or that by reaſon of ſome collateral provocation given by *D.* to *A. A.* kills him without any abetting by any of the reſt of his company, this doth not make all the party of *A.* tho preſent, to be therefore

(*) *viz.* who committed the homicide.

fore aiding and abetting, and conſequently principal in this murder or manſlaughter, which was accidental, and not within the compaſs of their original intention.

But if, when they had come to ſteal the deer, or throw down the incloſure, any had oppoſed them in it either by words or actual reſiſtance, and *A.* had kild him, it had been murder in all the reſt of the company, that came with the intent to do that unlawful act, tho there were no expreſs intention to kill any perſon in the firſt enterprize, becauſe the law preſumes they come to make good their deſign againſt all oppoſition.

And this is the reaſon of the book 3 *E.* 3. *Coron.* 350. where many came to commit a diſſeiſin, and one was kild, and all, that were of the company, were arraigned as principals, and the fact found, and they were condemned, tho the jury ſaid they did nothing (*de malè volunt*) of malice, but were of the company; tho poſſibly, as the circumſtances of that caſe were, it was only manſlaughter, as in the caſe of *Drayton Baſſet*, becauſe it was upon a ſudden, and upon a pretenſe of title.

3. Again, altho if many come upon an unlawful deſign, and one of the company kill one of the adverſe party in purſuance of that deſign, all are principals; yet if many be together upon a lawful account, and one of the company kill another of an adverſe party without any particular abetment of the reſt to this fact of homicide, they are not all guilty, that are of the company, but only thoſe, that gave the ſtroke, or actually abetted him to do it.

There is a common nuſance committed in the highway by *A. B. C. D.* in the vill of *M.* and *E. F. G. H. J. &c.* and twenty more of the inhabitants of *M.* come to remove the nuſance, *A. B. C.* and *D.* oppoſe, *F.* ſtrikes *A.* ſuddenly, and kills him, *F.* is guilty of manſlaughter, but the reſt of the party of *F.* are not therefore guilty, barely upon this account, that they were of the company, but only ſuch of the company, as did actually aſſiſt or abet *F.* to ſtrike or kill *A.*

But if in truth it were no nuſance, but an act that was lawfully done by *A.* and then *A.* had been kild by *F.* all the reſt of the party and company of *F.* had been guilty,

that came with deſign to remove that, which they thought a nuſance, but was not, becauſe it was a riotous and unlawful aſſembly.

If *A.* hath a good title to his houſe, or hath been in poſſeſſion thereof for three years, (in which caſe he may detain it with force by the ſtatute of 8 *H.* 6. *cap.* 9.) if any perſon come to rob him, or kill him, and he ſhoot and kill him, it is not felony, nor doth he forfeit his goods, as in caſe of homicide *ſe defendendo.* 11 *Co. Rep.* 82. *b.* 5 *Co. Rep.* 91. *b.*

But if *A.* comes to enter with force, and in order thereunto ſhoots at his houſe, and *B.* the poſſeſſor, having other company in his houſe, ſhoots and kills *A.* this is manſlaughter in *B.* and ſo it is ruled 5 *Eliz.* in *Harcourt's* caſe, *Crompt.* 29. *a. Dalt. cap.* 78. *p.* 105. (*m*). *Ibid. cap.* 98. *p.* 250. (*n*)

And in this caſe, if *B.* ſhoot out of his houſe, and killeth *A.* I think it plain, that it is not felony in the reſt of the houſhold, nay, tho he had hired extraordinary company to help to guard his houſe upon ſuch an occaſion, (as by law it ſeems he may do, notwithſtanding the opinion of *Crompton, fol.* 70. *a.* to the contrary, *vide* 21 *H.* 7. 39. *a.* 5 *Co. Rep.* 91. *b. Seaman's* caſe, 11 *Co. Rep.* 82. *b. Lewes Bowle's* caſe) yet this is not manſlaughter in the reſt of the company, becauſe the aſſembly was lawful and juſtifiable.

And therefore, in that caſe, no others of the company, that are in the houſe, ſhall be ſaid, guilty, but only ſuch as actually abet him to do the fact; and theſe indeed will be principals by reaſon of actual abetting, but not barely upon the account of being in the houſe and of the ſame company, becauſe the aſſembly to defend the houſe by lawful means was lawful.

But in the caſe of a riotous aſſembly to rob, or ſteal deer, or do any unlawful act of violence, there the offenſe of one is the offenſe of all the company, as in the caſe of the lord *Dacre*, and of the houſe of *Drayton Baſſet*, where there was firſt a riotous and unlawful entry, and keeping poſſeſſion by thoſe that ſhot.

(*m*) *New Edit. cap.* 127. *p.* 427. (*n*) *cap.* 150. *p.* 483.

4. If there be many, that are preſent, abetting, aiding and aſſiſting, tho all may, as in the caſes afore ſhewn, be guilty of homicide, yet upon different circumſtances ſome may be guilty of homicide, and not of murder, others may be guilty of murder; *vide* the caſe of *Salisbury* before, *Plowd. Com.* 101. *a.* The maſter aſſaults with malice prepenſe, the ſervant being ignorant of the malice of his maſter, takes part with his maſter, and kills the other, it is manſlaughter in the ſervant, and murder in the maſter.

Upon a ſudden falling out between *A.* and *B.* in the ſtreet, *A.* gathers many of his friends together to aſſault *B.* and *B.* doth the like, the conſtable, and ſome in his aid, comes to part the affray, and keep the peace. *A.* hath notice, that he is the conſtable, but divers of his company know it not, nor could reaſonably or probably know it, *A.* kills the conſtable, this is murder in *A.* but the reſt of his company, that knew it not, are not guilty of the murder.

But ſuch of them, as knowing it to be the conſtable, yet abetted *A.* to kill him, are guilty of murder, thoſe that knew it not, and yet abetted *A.* to kill him, are guilty of manſlaughter; and thoſe, that neither knew him to be the conſtable, nor did actually abet nor aſſiſt *A.* to kill him, are not guilty, as it ſeems, becauſe this was a new emergency, and out of the bounds and verge of the quarrel, wherein they were before engaged, and ſuch whereunto theſe were not privy; *quod tamen quære.*

CHAP.

CHAP. XXXV.

Concerning the death of a perſon unknown, *and the proceedings thereupon.*

BEcauſe this chapter as well concerns *murder* as *manſlaughter*, before I come to examine the particular offenſes themſelves, I ſhall ſubjoin a few words touching this title.

Antiently there was a law introduced by *Canutus* the *Dane*, that if any man were ſlain in the fields, and the manſlayer were unknown, and could not be taken, the townſhip, where he was ſlain, ſhould be amerced to ſixty-ſix marks (*), and if it were not ſufficient to pay it, the hundred ſhould be charged, unleſs it could be made appear before the coroner upon the view of the body, that the party ſlain were an *Engliſhman*, and this *making it appear* was various, according to the cuſtom of ſeveral places, but moſt ordinarily it was by the teſtimony of two males of the part of the father of him, that was ſlain, and by two females of the part of his mother.

And this amercement was uſually called *murdrum*, and the preſentment and proof, that the party ſlain was an *Engliſhman*, was called *Engleſhery*, and preſentment of *Engleſhery*.

And this was therefore provided to avoid the ſecret murder of the *Danes*, who were hated by the *Engliſh*, and oftentimes privily murderd; this appears by *Bracton* (*a*), and is tranſcribed out of him by *Stamf. Lib.* I. *cap.* 10. *fol.* 17.

When *William* the firſt came in, he found the like animoſity by the *Danes* and *Saxons* againſt the *French* and *Normans*, who were many times ſecretly kild by the natives, and therefore he did in effect continue this law (†), only he applied it to the

(*) See the laws of *Edward* the confeſſor, *Lib.* XV. & XVI. by which it appears the amerciament was XLVI marks, and not LXVI marks, as *Bracton* ſays, which miſtake might probably be occaſiond, as *Wilkins* obſerves in his notes *ad Leg. Anglo-Sax. p.* 280. by the tranſpoſition of the numeral letters L and X.

(*a*) *Lib.* III. *de corona, cap.* 15. *p.* 134. *b.*

(†) *Vide Leg. Gul. Con. l.* 26. & *Leg. Hen.* I. *l.* 91. *Wilk. Leg. Anglo-Sax. p.* 224, 280.

the *French* and *Normans*, *viz.* that if a perſon were ſlain by an unknown hand, if he were a *Frenchman* or a *Norman*, the hundred was amerced, where he was found, and if they were inſufficient, then the county, which was ſometimes 36 *l.* ſometimes 24 *l.*

And tho this was inſtituted for the preſervation of the *French* and *Normans*, yet intermarriages happening between the natives and them, ſo that in proceſs of time they became, as it were, one people, the ſame cuſtom was continued as to all perſons, that were kild by unknown hands, and this amerciament was called *murdrum*.

This appears at large by the black book of the Exchequer written by *Gervaſius Tilburienſis*, *Lib.* I. *cap. Quid murdrum, & quare ſit dictum*, which expounds the true ſcope of the ſtatute of *Marlbridge*, *cap.* 26. *Quod murdrum de cætero non adjudicetur pro mortuo per infortunium.*

But as well the preſentment of *Engleſbery*, as the amerciament for ſecret homicide by perſons unknown, was taken away by the ſtatute of 14 *E.* 3. *cap.* 4. yet there remained a certain amerciament upon the townſhip, where a perſon was ſlain, and the offender eſcaped, *viz.* If a perſon were ſlain in the day-time, in a town walled, or not walled, the town is to be amerced, if the vill be not ſufficient, the hundred ſhall be charged, and on default of them the county.

If he be ſlain in the day-time out of any vill, the hundred ſhall be amerced, and on their diſability the county ſhall be charged with the amerciament.

If a man be kild either in day or night, and the offender be taken and committed to the conſtable, or to the vill, if he eſcape, the townſhip where the party was ſlain, or where the offender was taken, ſhall be fined. (*b*)

But if a perſon be ſlain in the day or night in a walled town, and the offender be not taken, the town or city ſhall be fined.

If any private perſon be preſent when a murder or manſlaughter is committed, and doth not his beſt endeavour

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(*b*) For the vill *is* not diſcharged, till he be deliverd into gaol, or to the cuſtody of the ſheriff, after which the ſheriff will be chargeable. *Stamf. P. C. cap.* 31.

to apprehend the malefactor, he ſhall be fined and impriſoned.

All which differences appear by comparing the books of *Stamf. P. C. cap.* 30 & 31. *Coke P. C. cap.* 7. *p.* 53. 3 *H.* 7. *cap.* 1. and the books there cited.

CHAP. XXXVI.

Touching murder, *what it is, and the kinds thereof.*

MUrder and manſlaughter differ not in the kind or nature of the offenſe, but only in the degree, the former being the killing of a man of malice prepenſe, the latter upon a ſudden provocation and falling out.

And therefore it is, that upon an indictment of murder the party offending may be acquitted of murder, and yet found guilty of manſlaughter, as daily experience witneſſeth (*a*), and they may not find him generally *not guilty*, if guilty of manſlaughter.

In an appeal of murder it is agreed on all hands, that the jury may find him not guilty of the murder, and guilty of manſlaughter; this was accordingly ruled (*b*) *P.* 34 *Eliz. B. R.* the caſe of *Wroth* and *Wigges* (*c*). *P.* 5 *Jac. B. R. n.* 20. *Pellett* and *Barenden*, *P.* 7 *Jac. B. R. n.* 11. (*d*), but it hath been held, that altho upon an indictment of murder, if the party appear to be guilty of manſlaughter, the jury ought not to acquit him generally, but find him guilty of manſlaughter; yet in an appeal of murder, tho the jury may, if they pleaſe, find him guilty of manſlaughter, if the fact be ſuch, yet they may find generally, that he is *not guilty*, becauſe

(*a*) See *Daliſon* 14.
(*b*) Or rather taken for granted.
(*c*) *Cro. Eliz.* 276. See alſo *Cro. Eliz.* 296. 1 *Sid.* 325.
(*d*) Theſe two caſes I do not find any where among the printed reports.

becauſe it is the ſuit of the party, and he ſhould lay his caſe according to the truth.

With this agrees *H.* 38 *Eliz. B. R. Penryn* and *Corbett* (*e*), *H.* 38 *Eliz. B. R. B.* 183. (*f*), *M.* 22 *Jac. B. R. L.* 278. *Blount's* caſe (*g*), but it was held *P.* 2 *Car.* 1. in *Baſſage's* caſe (*b*), that they may not in ſuch caſe find a general verdict of *not guilty*, but muſt find him guilty of manſlaughter, becauſe included in murder, as well in caſe of an appeal, as in caſe of an indictment, and ſo it ſeems the law is.

The difference between the offenſes of murder and manſlaughter ſeems to reſt in theſe particulars.

1. In the degree and quality of the offenſe, for murder, as hath been ſaid, is accompanied with malice forethought, either expreſs or preſumed, but bare homicide is upon a ſudden provocation or falling out.

2. And therefore in murder there may be acceſſaries before, as well as after, becauſe ordinarily it is an act of deliberation, and not merely of ſudden paſſion; but in bare homicide or manſlaughter there can be no acceſſaries before, tho there may be acceſſaries after, and therefore, if an indictment be of murder againſt *A.* and that *B.* and *C.* were counſelling and abetting as acceſſaries before only, (and not as preſent, aiding and abetting, for ſuch are principals, as hath been ſaid) if *A.* be found guilty only of homicide, and acquit of the murder, the acceſſaries before are hereby diſcharged.

3. The indictment of murder eſſentially requires theſe words *felonicè ex malitiâ ſuâ præcogitatâ interfecit & murdravit*, but the indictment of ſimple homicide is only *felonicè interfecit.*

4. Altho at common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. clergy was promiſcuouſly allowed, as well in caſe of murder, as of homicide or manſlaughter, yet by the ſtatute of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. 1 *E.* 6. *cap.* 12. 5 & 6 *E.* 6. *cap.* 10. clergy is taken away from murder *ex malitiâ præcogitatâ.*

Now

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(*e*) *Cro. Eliz.* (464.)
(*f*) I ſuppoſe this may be the caſe of *Goff* and *Eyly*, *Cro. Eliz.* 540.
(*g*) 2 *Roll. Rep.* 460.
(*b*) *Latch* 126.

Now having before, *cap.* 33. declared thoſe things, that are common to the offenſes of murder and manſlaughter, it remains, that I conſider thoſe things, that are ſpecifical and peculiar to murder, which is what ſhall be ſaid a killing *ex malitiâ præcogitatâ*, or what in law is ſaid ſuch a malice, as makes the offenſe of killing a perſon thereby to be murder.

Such a malice therefore, that makes the killing of a man to be murder, is of two kinds, 1. Malice in fact, or 2. Malice in law, or *ex præſumptione legis.*

Malice in fact is a deliberate intention of doing ſome corporal harm to the perſon of another.

Malice in law, or preſumed malice, is of ſeveral kinds, *viz.* 1. In reſpect of the manner of the homicide, when without provocation. 2. In reſpect of the perſon kild, *viz.* a miniſter of juſtice in execution of his office. 3. In reſpect of the perſon killing.

Touching the firſt of theſe in this chapter, *viz.* malice in fact.

Malice in fact is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized.

The evidences of ſuch a malice muſt ariſe from external circumſtances diſcovering that inward intention, as lying in wait, menacings antecedent, former grudges, deliberate compaſſings, and the like, which are various according to variety of circumſtances.

It muſt be a compaſſing or deſigning to do ſome bodily harm.

If there have been a long ſuit in law between *A.* and *B.* either touching intereſt or wrong done, as if *A.* ſue *B.* or threaten to ſue him, this alone is not a ſufficient evidence of malice prepenſe, tho poſſibly they meet and fall out, and fight, and one kills the other, if it happen upon ſudden provocation; but this may by circumſtances be heightened into a malice prepenſe, as if *A.* without any new provocation ſtrike *B.* upon the account of that difference in law, whereof *B.* dies, or *è converſo*, or if he lie in wait to kill him, or come with a reſolution to ſtrike or kill him, for in ſuch a caſe the difference in the law-ſuit, (which alone makes not malice) is coupled and joined with circumſtances, that prove the purpoſe

poſe of the party was more, than the law allows in a legal vindication of wrong done.

If there be an old quarrel betwixt *A.* and *B.* and they are reconciled again, and then upon a new and ſudden falling out *A.* kills *B.* this is not murder, but if upon circumſtances it appears, that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the ſcore of the old malice, then it is murder.

If there be malice by *A.* againſt *B.* and by *B.* againſt *A.* and they meet, and upon the account of that malice *A.* ſtrikes *B.* and *B.* thereupon kills *A.* (otherwiſe than in his own neceſſary defenſe) it is murder in *B.* but if they meet accidentally, and *A.* aſſaults *B.* firſt, and *B.* merely in his own defence, without any other malicious deſign kills *A.* this is not murder in *B.* for it was not upon the account of the former malice, but upon a new and ſudden emergency for the ſafeguard of his life; but if *A.* and *B.* had met deliberately to fight, and *A.* ſtrikes *B.* and purſues *B.* ſo cloſely, that *B.* in ſafeguard of his own life kills *A.* this is murder in *B.* becauſe their meeting was a compact, and an act of deliberation, and therefore all, that follows thereupon, is preſumed to be done in purſuance thereof, and thus is Mr. *Dalton, cap.* 93. *p.* 241. (*i*) to be underſtood.

But yet *quære*, whether if *B.* had really and truly declined the fight, ran away as far as he could, (ſuppoſe it half a mile,) offerd to yield, and yet *A.* refuſing to decline it had attempted his death, and *B.* after all this kills *A.* in his own defenſe, whether it excuſeth him from murder; but if the running away were only a pretenſe to ſave his own life, but was really deſigned to draw out *A.* to kill him, it were murder.

A. commands *B.* to kill *C.* and before the act done repents, and countermands *B.* and charges him not to do it, yet *B.* doth it, *A.* is not guilty. *Co. P. C. p.* 51.

A. challenges *C.* to meet in the field to fight, *C.* declines it as much as he can, but is threatned by *A.* to be poſted for a coward, *&c.* if he meet not, and thereupon *A.* and *B.* his ſe-

2 cond,

(*i*) *New Edit. cap.* 145. *p.* 471.

cond, and *C.* and *D.* his ſecond, meet and fight, and *C.* kills *A.* this is murder in *C.* and *D.* his ſecond, and ſo ruled in *P.* 14 *Jac.* in *Taverner*'s caſe (*k*), tho *C.* unwillingly accepted the challenge.

But it ſeems not to be murder in *B.* becauſe tho he had malice againſt *C.* and *D.* his opponents, yet he had none againſt *A.* tho ſome have thought it to be murder alſo in *B.* becauſe done by compact and agreement. 22 *E.* 3. *Cor.* 262. *ſed quære de hoc.*

If *A.* challenge *B.* to fight, *B.* declines the challenge, but lets *A.* know, that he will not be beaten, but will defend himſelf; if *B.* going about his occaſions wears his ſword, is aſſaulted by *A.* and kild, this is murder in *A.* but if *B.* had kild *A.* upon that aſſault, it had been *ſe defendendo*, if he could not otherwiſe eſcape, or bare homicide, if he could eſcape, and did not.

But if *B.* had only made this as a diſguiſe to ſecure himſelf from the danger of the law, and purpoſely went to the place, where probably he might meet *A.* and there they fight, and he kills *A.* then it had been murder in *B.* but herein circumſtances of the fact muſt guide the jury.

If *A.* and *B.* fall ſuddenly out, and they preſently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and *A.* kills *B.* this is not murder but homicide, for it is but a continuance of the ſudden falling out, and the blood was never cooled, but if there were deliberation, as that they meet the next day, nay, tho it were the ſame day, if there were ſuch a competent diſtance of time, that in common preſumption they had time of deliberation, then it is murder. *Co. P. C. p.* 51. *Jac. B. R. Ferrer*'s caſe, *M.* 8 *Jac. B. R. Morgan*'s caſe.

A. the ſon of *B.* and *C.* the ſon of *D.* fall out in the field and fight, *A.* is beaten, and runs home to his father all bloody, *B.* preſently takes a ſtaff, runs into the field, being three quarters of a mile diſtant, and ſtrikes *C.* that he dies, this is not murder in *B.* becauſe done in ſudden heat and paſſion. *T.* 9 *Jac. B. R.* 12 *Co. Rep. p.* 87. (*l*)

(*k*) 1 *Rol. Rep.* 360. 3 *Bul.* 171. (*l*) *Cro. Jac.* 296. *Royley*'s caſe.

A boy came into *Oſterly* park to ſteal wood, and ſeeing the woodward climbs up a tree to hide himſelf, the woodward bids him come down, he comes down, and the woodward ſtruck him twice, and then bound him to his horſe-tail, and dragged him till his ſhoulder was broke, whereof he died; it was ruled murder, becauſe, 1. The correction was exceſſive, and 2. It was an act of deliberate cruelty. *M.* 4 *Car. B. R. Holloway*'s caſe. (*m*)

If the maſter deſigneth moderate correction to his ſervant, and accordingly uſeth it, and the ſervant by ſome misfortune dieth thereof, this is not murder, but *per infortunium. Cromp.* 136. *b. Dalt. cap.* 96. *p.* 245. (*n*), becauſe the law alloweth him to uſe moderate correction, and therefore the deliberate purpoſe thereof is not *ex malitiâ præcogitatâ.*

But if the maſter deſign an immoderate or unreaſonable correction, either in reſpect of the meaſure, or manner, or inſtrument thereof, and the ſervant die thereof, I ſee not how this can be excuſed from murder, if done with deliberation and deſign, nor from manſlaughter, if done haſtily, paſſionately, and without deliberation; and herein conſideration muſt be had of the manner of the provocation, the danger of the inſtrument, which the maſter uſeth, and the age or condition of the ſervant, that is ſtricken, and the like of a ſchool-maſter towards his ſcholar. (*o*)

The ſheriff hath a warrant to hang a man for felony, and he beheads him, this is held murder, for it is an act of deliberation. *Co. P. C. p.* 52.

A man hath the liberty of *Infangthiefe* (*p*), the ſteward of the court gives judgment of death againſt a priſoner againſt law, this was a cauſe of ſeizure of the liberty, but was not murder in the judge, *quia factum judiciáliter, licèt ignoranter.* 2 *R.* 3. 10. *a.* the caſe of the ſteward of the liberty of the abbot of *Crowland.*

4 CHAP.

(*m*) *Cro. Car.* 131. *W. Jones* 198. *Kelyng* 127.
(*n*) *cap.* 148. *p.* 478.
(*o*) See *Kelyng* 64, 65.
(*p*) See *Spelman*'s *Gloſſary*, *p.* 313.

CHAP. XXXVII.

Concerning murder *by* malice implied *preſumptive, or* malice in law.

I Have before diſtinguiſhed malice implied into theſe kinds: 1. When the homicide is voluntarily committed without provocation. 2. When done upon an officer or miniſter of juſtice. 3. When done by a perſon, that intends a theft or burglary, *&c.*

1. Therefore touching the former of theſe.

When one voluntarily kills another without any provocation, it is murder, for the law preſumes it to be malicious, and that he is *hoſtis humani generis*; it remains therefore to be inquired, what is ſuch a provocation, as will take off the preſumption of malice in him, that kills another.

He that wilfully gives poiſon to another, that hath provoked him or not, is guilty of wilful murder, the reaſon is, becauſe it is an act of deliberation odious in law, and preſumes malice.

If *A.* comes to *B.* and demands a debt of him, or comes to ſerve him with a *Subpœna ad reſpondendum* or *ad teſtificandum*, and *B.* thereupon kills *A.* this is murder, becauſe it is no provocation.

Watts came along by the ſhop of *Brains*, and diſtorted his mouth, and ſmiled at him, *Brains* kills him, it is murder, for it was no ſuch provocation, as would abate the preſumption of malice in the party killing. *M.* 42 *&* 43 *Eliz. B. R. Brain's* caſe. (*a*)

If *A.* be paſſing the ſtreet, and *B.* meeting him, (there being convenient diſtance between *A.* and the wall,) takes the wall of *A.* and thereupon *A.* kills him, this is murder; but if *B.* had juſtled *A.* this juſtling had been a provocation, and would

(*a*) *Cro. Eliz.* 778. *Kel.* 131.

would have made it manſlaughter, and ſo it would be, if *A.* riding on the road, *B.* had whipt the horſe of *A.* out of the track, and then *A.* had alighted, and kild *B.* it had been manſlaughter. 17 *Car.* 1. *Lanure*'s caſe.

In the caſe of the lord *Morley*, 18 *Car.* 2. (*b*) all the judges met, and it was agreed by all the judges except one, that if *A.* gives ſlighting words to *B.* and thereupon *B.* immediately kills him, this is murder in *B.* and that ſuch words are not in law ſuch a provocation, as will extenuate the offenſe into manſlaughter, and the ſtatute of 1 *Jac. cap.* 8. of ſtabbing in ſuch a caſe was but proviſional, becauſe the juries were apt upon any verbal provocation to find the fact to be manſlaughter; but it was there held, that words of menace of bodily harm would come within the reaſon of ſuch a provocation, as would make the offenſe to be but manſlaughter.

And many, who were of opinion, that bare words of ſlighting, diſdain, or contumely, would not of themſelves make ſuch a provocation, as to leſſen the crime into manſlaughter, yet were of this opinion, that if *A.* gives indecent language to *B.* and *B.* thereupon ſtrikes *A.* but not mortally, and then *A.* ſtrikes *B.* again, and then *B.* kills *A.* that this is but manſlaughter, for the ſecond ſtroke made a new provocation, and ſo it was but a ſudden falling out, and tho *B.* gave the firſt ſtroke, and after a blow received from *A.* *B.* gives him a mortal ſtroke, this is but manſlaughter according to the proverb *the ſecond blow makes the affray*; and this was the opinion of myſelf and ſome others.

There was a ſpecial verdict found at *Newgate*, *viz.* *A.* ſitting drinking in an alehouſe, *B.* a woman called him a *ſon of a whore*, *A.* takes up a broomſtaff, and at a diſtance throws it at her, which hitting her upon the head kild her, whether this were murder or manſlaughter was the queſtion in *P.* 26 *Car.* 2. it was propounded to all the judges at *Serjeants-Inn*, two queſtions were named, 1. Whether bare words, or words of this nature, would amount to ſuch a provocation, as would extenuate the fact into manſlaughter. (*c*)

4 2. Ad-

(*b*) *Kelyng* 55. (*c*) See *Kel.* 131.

2. Admitting it would not in caſe there had been a ſtriking with ſuch an inſtrument, as neceſſarily would have cauſed death, as ſtabbing with a ſword, or piſtolling, yet whether this ſtriking, that was ſo improbable to cauſe death, will not alter the caſe; the judges were not unanimous in it, and in reſpect, that the conſequence of a reſolution on either ſide was great, it was adviſed the king ſhould be moved to pardon him, which was accordingly done.

A. and *B.* are at ſome difference, *A.* bids *B.* take a pin out of the ſleeve of *A.* intending thereby to take an occaſion to ſtrike or wound *B.* which *B.* doth accordingly, and then *A.* ſtrikes *B.* whereof he died; this was ruled murder, 1. Becauſe it was no provocation, when he did it by the conſent of *A.* 2. Becauſe it appeard to be a malicious and deliberate artifice thereby to take occaſion to kill *B.*

If there be chiding between huſband and wife, and the huſband ſtrikes his wife thereupon with a peſtle, that ſhe dies preſently, it is murder, and the chiding will not be a provocation to extenuate it to manſlaughter. 43 *Eliz. Crompt. fol.* 120. *a.* (*d*)

II. The ſecond kind of malice implied is, when a miniſter of juſtice, as a bailiff, conſtable, or watchman, *&c.* is kild in the execution of his office, in ſuch a caſe it is murder.

If the ſheriff's bailiff comes to execute a proceſs, but hath not a lawful warrant, as if the name of the bailiff, plaintiff, or defendant be interlined or inſerted after the ſealing thereof by the bailiff himſelf, or any other, if ſuch bailiff be kild, it is but manſlaughter, and not murder.

But if a proceſs iſſuing out of a court of record to a ſerjeant at mace, ſheriff, or other miniſter, be erronious, as if a *Capias* iſſue, when a *Diſtringas* ſhould iſſue, yet the killing of ſuch a miniſter in the execution of that proceſs is murder, altho he execute the proceſs in the night (*e*), or upon a *Sunday* (*f*). *Mackally*'s caſe, 9 *Co. Rep.* 68. *a.*

(*d*) See alſo *Kel.* 64.

(*e*) 9 *Co.* 66. *a.*

(*f*) 9 *Co.* 66. *b.* for miniſterial acts might lawfully be executed upon a *Sunday*, but ſince our author wrote, the law is alterd in this reſpect, for by 29 *Car.* 2. *cap.* 7. all proceſs, warrants, *&c.* ſerved or executed on a *Sunday* are void, except in caſes of treaſon, felony, or breach of the peace, ſo that now an officer arreſting

But if the process be executed out of the jurisdiction of the court, the killing of the minister is only manslaughter, and so it is, if the issuing of the process were void, and *coram non judice.*

A bailiff or officer *jurus & conus* may arrest a man without shewing his warrant (*g*), and a private bailiff need not show his warrant upon the arrest, till the party arrested demand it, and therefore, if the party arrested kill a bailiff upon the arrest without such a warrant shewn, it is murder, and so it is, if a serjeant at mace makes the arrest without shewing his mace, *ibidem Machally's* case. (*b*)

A bailiff *jurus & conus* had a warrant to arrest *Pew* upon a *Capias*, and came to arrest him, not using any words of arrest, *Pew* said, *Stand off, I know you well enough, come at your peril*, the bailiff takes hold of him, *Pew* thrusts him through; it was ruled murder, tho he used no words of arrest, nor shewed his warrant, for possibly he had not time. *P. 6 Car. I. B. R.* (*i*)

A bailiff having a warrant to arrest *Cook* upon a *Capias ad satisfaciendum* came to *Cook's* house, and gave him notice, *Cook* menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest, *Cook* shoots him, and kills him; it was ruled, 1. That it is not murder, because he cannot break the house (*k*), otherwise it had been, if it had been upon an *Habere facias possessionem* (*l*). 2. But it was manslaughter, because he knew him to be a bailiff. But 3. Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. *P. 15 Car. B. R.* (*m*)

But if a sheriff enter the house by the outward door open, he or his bailiff may break open the inward doors, tho the

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resting a man upon a warrant on a *Sunday* is, as if he had arrested him without any warrant at all.

(*g*) Tho the party do demand it; this is intended of the warrant constituting him bailiff; but as to the writ or process against the party, there is no difference between a public or a private bailiff, for in either case, if the party submit to the arrest, and do demand it, he is bound to shew at whose suit, for what cause, out of what court the process issues, and when, and where returnable. *5 Co. 54. a. 9 Co. 69. a.*

(*b*) *9 Co. 69. a.*

(*i*) *Cro. Car.* 183.

(*k*) *5 Co. 92. b. Semayne's* case.

(*l*) *5 Co. 91. b.*

(*m*) *Cro. Car.* 537. *W. Jones* 429.

the proceſs be without a *Non omittas*, and therefore the killing of him in ſuch caſe is murder. *M.* 17 *Jac. B. R. White* and *Wiltſhire.* (*n*)

If the ſheriff or bailiff have once laid hands upon the priſoner, and ſo began his execution, he may break open the outward doors to take him, Sir *William Fiſbe*'s caſe (*o*), and if the warrant be directed to five bailiffs, two or three may make execution; reſolved in *White*'s caſe *ubi ſupra.*

Upon a warrant againſt a felon, or one that hath dangerouſly wounded another, or for ſurety of the peace, or good behaviour, the conſtable may break open the door, where the offender is, *Dalt. cap.* 78. (*p*), and ſo may the ſheriff or his bailiff upon a *Capias utlegatum*, *Capias pro fine*, or other proceſs for the king, if not opend upon demand.

The conſtable of the vill of *A.* comes into the vill of *B.* to ſuppreſs ſome diſorder, and in the tumult the conſtable is kild in the vill of *B.* this is only manſlaughter, becauſe he had no authority in *B.* as conſtable.

But it ſeems, that if the conſtable of the vill of *A.* had a particular precept from a juſtice of peace directed to him by name, or by the name of the conſtable of *A.* to ſuppreſs a riot in the vill of *B.* or to apprehend a perſon in the vill of *B.* for ſome miſdemeanor, and within the juriſdiction and conuſance of the juſtice of peace, and in purſuance of that warrant he go to arreſt the party in *B.* and in execution of his warrant is kild in *B.* this is murder, for tho in ſuch caſe it ſeems the conſtable was not bound to execute the warrant out of his juriſdiction, neither could he do it ſingly *virtute officii* as conſtable of *A.* yet he may do it as bailiff or miniſter by virtue of the warrant, and the killing of him is murder, as well as if he had been conſtable of the hundred wherein *A.* and *B.* lie, or ſheriff of the county, for a juſtice of peace may for a matter within his juriſdiction iſſue his warrant to a private perſon, as ſervant; but then ſuch perſon muſt ſhew his warrant, or ſignify the contents of it. 14 *H.* 8. 16. *a.*

And

(*n*) *Palmer* 52. (*o*) Cited in *White*'s caſe, *Palmer* 53. (*p*) *New Edit. cap.* 127. *p.* 426.

And altho the warrant of the juſtice be not in ſtrictneſs lawful, as if it expreſs not the cauſe particularly enough, yet if the matter be within his juriſdiction as juſtice of peace, the killing of ſuch officer in execution of his warrant is murder, for in ſuch caſe the officer cannot diſpute the validity of the warrant, if it be under ſeal of the juſtice. 14 *H.* 8. 16.

If *A.* and *B.* are conſtables of the vill of *C.* and there happens a riot or quarrel between ſeveral perſons, *A.* joins with one party, and commands the adverſe party to keep the peace, *B.* joins with the other party, and in like manner commands the adverſe party to keep the peace, and the aſſiſtants and party of *A.* in the tumult kill *B.* it ſeems that this is but manſlaughter, and not murder, in as much as the officers and their aſſiſtants were one engaged againſt the other, and each had as much authority as the other.

But if the ſheriff having a writ of *Habere facias poſſeſſionem* againſt the houſe and lands of *A.* and *A.* pretending it to be a riot upon him gain the conſtable of the vill to aſſiſt him, and to ſuppreſs the ſheriff or his bailiffs, and in the conflict the conſtable is kild, this is not ſo much as manſlaughter, but if any of the ſheriff's officers were kild, it is murder, becauſe the conſtable had no authority to encounter the ſheriff's proceeding or acting by virtue of the king's writ.

If a conſtable, or tithing-man, or watchman be in execution of his office, and be kild, it is murder; and in all caſes of implied malice, or malice in law, the indictment need not be ſpecial, but general *ex malitiâ ſuâ præcogitatâ interfecit & murdravit*, and the malice in law maintains the indictment. 9 *Co. Rep.* 68. *Mackally's* caſe.

But now touching the point of notice.

1. It is not neceſſary to make it murder, that the party killing know the perſon of the bailiff, conſtable, or watchman.

2. If he be a bailiff *juratus & comus*, it ſeems there is no neceſſity for him to notify himſelf to be ſuch by expreſs words, but it ſhall be preſumed, that the offender knew him, as it ſeems by the book 9 *Co. Rep.* 69. *b. Mackally's* caſe; *quære.*

3. But

3. But if it be a private bailiff, either the party muſt know that he is ſo, as in *Pew*'s caſe before, or there muſt be ſome ſuch notification thereof, whereby the party may know it, as by ſaying, *I arreſt you*, which is of itſelf ſufficient notice, and it is at the peril of the party, if he kill him after theſe words, or words to that effect pronounced, for it is murder, if *de facto* it fall out, that he were a bailiff, and had a warrant. 9 *Co. Rep. ubi ſupra.*

4. A conſtable coming to appeaſe a ſudden affray in the day-time in the village, whereof he is conſtable, it ſeems every man *ex officio* is bound to take notice, that he is the conſtable, becauſe he is to be choſen and ſworn in the leet, where all reſiants are to attend, 4 *Co. Rep.* 40. *b. Young*'s caſe (*q*); but it is not ſo in the night-time, unleſs there be ſome notification, that he is the conſtable.

5. But whether it be in the day or night, it is ſufficient notice, if he declare himſelf to be the conſtable, or command the peace in the king's name, and the like for any, that come in his aſſiſtance, or for a watchman, *&c.* and therefore, if any of them are kild after ſuch a notification, it is murder in them, that kill him. 9 *Co. Rep.* 68. *b. Mackally*'s caſe.

And theſe differences may be collected out of the books 4 *Co. Rep.* 40. *Young*'s caſe, " Et en ceſt caſe fuit tenus *per to-*
" *tam curiam*, que ſi ſur affray fait le conſtable & autres en
" ſon aſſiſtance veignont a ſuppreſſer le affray & a preſer-
" ver le peace, & en feſant lour office le conſtable ou aſcun
" de ſes aſſiſtants ſoit tue, ceo eſt murder en ley, coment
" que le murderer ne ſcavoit le party, que fuit tue, & coment
" que le affray fuit ſodein, pur ceo que le conſtable & ſes aſ-
" ſiſtants veigne per authoritie del ley pur le garder del peace
" & a preventer le danger, que poit enſuer per le infreinder
" de ceo, & pur ceo le ley adjudgera ceo murder, & que le
" murderer avoit malice prepenſe, pur ceo, que il oppoſe luy
" meſme enconter le juſtice del realme, & iſſint de le vil-

(*q*) The reaſon here given by our author is not mentiond in this caſe, but it is there held, that a perſon's acting as conſtable is a ſufficient notification, altho the party do not otherwiſe know him to be ſo.

" cont, ou ſon bailiff, ou watchman en feſant ſon office." And 9 *Co. Rep.* 69. *Mackally's* caſe, where it was objected, that the ſerjeant at mace did not ſhew his mace, whereby the offender might know him to be an officer; yet it was ruled, that the killing of him was murder, 1. Becauſe it was found, that he was *ſerviens ad clavam, juratus & cognitus*, and a bailiff *jurus & conus* need not ſhew his warrant, tho demanded, nor another bailiff without demand, and when the books ſpeak of a bailiff *jurus & conus*, it is not neceſſary, that he be known to the party arreſted, but it is ſufficient if he be commonly known. 2. " Si notice fuit requiſite il done ſuf-
" ficient notice, quant il dit *jeo toy arreſt in le noſme le roy, &c.*
" Et le party a ſon peril doit luy obeyer, & ſil nad loyall gar-
" rant, il poit aver ſon action de faux impriſonment, iſſint
" que in ceſt caſe ſans queſtion le ſerjant ne beſoigne a mon-
" ſtre ſon mace, car ſils ſerra chaſe a monſtre lour mace, ceo
" ſerra warning al party deſtre arreſt a fuer.

H. 24 & 25 *Car.* 2. A great number of perſons aſſembled in a houſe called *Siſſinghurſt* in *Kent*, iſſued out and committed a great riot and battery upon the poſſeſſors of a wood adjacent, one of their names, *viz. A.* was known, the reſt were not known; a warrant was obtaind from a juſtice of peace to apprehend the ſaid *A.* and divers other perſons unknown, which were all together in *Siſſinghurſt-houſe*, the conſtable, with about ſixteen or twenty called to his aſſiſtance, came with the warrant to the houſe, and demanded entrance, and acquainted ſome of the perſons within, that he was the conſtable, and came with the juſtice's warrant, and demanded *A.* with the reſt of the offenders, that were then in the houſe, and one of the perſons within came and read the warrant, but denied admiſſion to the conſtable, or to deliver *A.* or any of the malefactors, but going in commanded the reſt of the company to ſtand to their ſtaves: the conſtable and his aſſiſtants fearing miſchief went away, and being about five rod from the door, *B. C. D. E. F. &c.* about fourteen in number, iſſued out and purſued the conſtable and his aſſiſtants; the conſtable commanded the peace, yet they fell on and kild one of the aſſiſtants of the conſtable, and wounded others, and

then retired into the houſe to the reſt of their company, which were in the houſe, whereof the ſaid *A.* and one *G.* that read the warrant, were two, for which the ſaid *A. B. C. D. E. F. G.* and divers others were indicted of murder, and tried at the king's bench bar, wherein theſe points were unanimouſly agreed.

1. That altho the indictment were, that *B.* gave the ſtroke, and the reſt were preſent, aiding, and aſſiſting, tho in truth *C.* gave the ſtroke, or that it did not appear upon the evidence, which of them gave the ſtroke, but only that it was given by one of the rioters, yet that evidence was ſufficient to maintain the indictment, for in law it was the ſtroke of all that party according to the reſolution in *Mackally's* caſe, 9 *Co. Rep.* 67. *b.*

2. That in this caſe all, that were preſent and aſſiſting to the rioters, were guilty of the death of the party ſlain, tho they did not all actually ſtrike him, or any of the conſtable's company.

3. That thoſe within the houſe, if they abetted or counſelled this riot, were in law preſent, aiding, and aſſiſting, and principals as well as thoſe that iſſued out and actually committed the aſſault, for it was but within five rod of the houſe, and in view thereof, and all done, as it were, in the ſame inſtant; *vide* lord *Dacre's* caſe before.

4. That here was ſufficient notice, that it was the conſtable before the man was kild, 1. Becauſe he was conſtable of the ſame vill. 2. Becauſe he notified his buſineſs at the door before the aſſault, *viz.* that he came with the juſtice's warrant. 3. Becauſe after his retreat, and before the man ſlain, the conſtable commanded the peace, and notwithſtanding it the rioters fell on, and kild the party.

5. It was reſolved, that the killing of the aſſiſtant of the conſtable was murder, as well as the killing of the conſtable himſelf.

6. That thoſe, that came in the aſſiſtance of the conſtable, tho not ſpecially called thereunto, are under the ſame protection as they that are called to his aſſiſtance by name.

7. That altho the conſtable retired with his company upon the not delivering up of *A.* yet the killing of the aſſiſtant of the

the conſtable in that retreat was murder. 1. Becauſe it was one continued act in the purſuance of his office, his retiring was as neceſſary, when he could not attain the effect of his warrant, and was in effect a continuation of the execution of his office, and under the ſame protection of the law, as his coming was. 2. Principally, becauſe the conſtable in the beginning of the aſſault, and before the man was ſtricken, commanded the peace, and is all one with *Yonge*'s caſe.

8. It ſeems, that tho the conſtable had not commanded the peace, yet when he and his company came about what the law allowd them, and, when they could not effect it fairly, were going their way, that the rioters purſuing them, and killing one, was murder in them all, becauſe it was done without provocation, for they were peaceably retiring; but this point was not ſtood upon, becauſe there was enough upon the former point to convict the offenders, and in the concluſion the jury found nine of them guilty, and acquitted thoſe within, not becauſe they were abſent, but becauſe there was no clear evidence, that they conſented to the aſſault, as the jury thought, and thereupon judgment was given againſt the nine to be hanged: and note, that the award was for the marſhal to do execution, becauſe they were remanded to the cuſtody of the marſhal, and he is the immediate officer of the court, and precedents in caſes of judgment given in the king's bench have commonly run, *Et dictum eſt mareſcallo, &c. quod faciat executionem periculo incumbente.* (r)

At *Newgate* in *Lent* vacation, 26 *Car.* 2. the caſe was thus: five perſons committed a robbery about *Hounſlow-heath* in *Middleſex*, *viz. Jackſon* and four others, the party robbed raiſed hue and cry, the country purſued them, and at *Hamſtead Jackſon* one of the five turned upon his purſuers, the reſt

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(r) And thus it was in the caſe of the *Althoes*, *T.* 9 *Geo.* I. *B. R.* who were convicted of a barbarous murder in *Pembrokeſhire*, at *Hereford* aſſizes, being the next *Engliſh* county; the indictment was removed by *Certiorari* into the king's bench, in order to argue ſome exceptions, which were over-ruled; and after ſome queſtion made, whether they ought not to be ſent back to *Herefordſhire* to receive ſentence there, the court was of opinion, that they had the ſame juriſdiction over facts committed in *Wales*, as if committed in the next adjacent county in *England*, and ſo they were ſentenced at the king's bench, and were executed by the marſhal at *Kennington* gallows near *Southwark*.

reſt being in the ſame field, and having often reſiſted the purſuers, and refuſing to yield kild one of the purſuers: by five judges then preſent it was ruled, 1. That this was murder, becauſe the country upon hue and cry levied are authorized by law to purſue and apprehend the malefactors; and in this caſe here was a felony done, and a felony done by thoſe perſons, that were thus purſued. 2. That altho there was no warrant of a juſtice of peace to raiſe hue and cry, and tho there was no conſtable in the purſuit, yet the hue and cry was a good warrant in law for them to apprehend the offenders, and the killing of any of the purſuants by *Jackſon* was murder. 3. In as much as all of the robbers were of a company, and made a common reſiſtance, and ſo one animated the other, all thoſe of the company of the robbers, that were in the ſame field, tho at a diſtance from *Jackſon*, were all principals, *viz.* preſent, aiding, and abetting. 4. That when one of the malefactors was apprehended a little before the party was hurt, that perſon being in cuſtody when the ſtroke was given was not guilty, unleſs it could be proved, that after he was apprehended he had animated *Jackſon* to kill the party: they had all judgment of death for the robbery, and four of them for the murder.

A preſs-maſter ſeiſed *B.* for a ſoldier, and with the aſſiſtance of *C.* laid hold on him, *D.* finding fault with the rudeneſs of *C.* there grew a quarrel between them, and *D.* kild *C.* By the advice of all the judges, except very few, it was ruled, that this was but manſlaughter, 17 *Car.* 2. (*f*)

III. the third kind of *malice implied* is in relation to the perſon killing.

If *A.* come to rob *B.* in his houſe, or upon the highway, or otherwiſe without any precedent intention of killing him, yet if in the attempt, either without or upon the reſiſtance of *B. A.* kills *B.* this is murder. *Co. P. C. p.* 52.

So if men come to ſteal deer in a park or foreſt, or to rob a warren of conies, and the parker, foreſter, or warrener reſiſts and is kild, this is murder; the lord *Dacre*'s caſe.

(*f*) *Hugget*'s caſe, 25 *April* 1666. at *Newgate*, *Kel.* 59, 137.

If a priſoner die by reaſon of dureſs and hard uſage by the gaoler, it is murder in the gaoler. *Co. P. C. p.* 52.

So if a ſheriff have a precept to hang a man for felony, and he beheads him, it is murder. *Co. P. C. ibidem.*

To theſe may be added the caſes abovementiond, *viz.* if *A.* by malice fore-thought ſtrikes at *B.* and miſſing him ſtrikes *C.* whereof he dies, tho he never bore any malice to *C.* yet it is murder, and the law transfers the malice to the party ſlain; the like of poiſoning, *ſed de his ſupra cap.*

CHAP. XXXVIII.

Of manſlaughter, *and particularly of* manſlaughter exempt from clergy, *by the ſtatute of* 1 Jac. 8.

MAnſlaughter, or ſimple homicide, is the voluntary killing of another without malice expreſs or implied, and differs not in ſubſtance of the fact from murder, but only differs in theſe enſuing circumſtances.

1. In the degree of the offenſe, murder being aggravated with malice preſumed or implied, but manſlaughter not, and therefore in manſlaughter there can be no acceſſaries before. 2. In the form of the indictment, the former being always *felonicè ex malitiâ præcogitatâ interfecit & murdravit*, the latter only *felonicè interfecit.* 3. In the point of clergy, murder being by the ſtatute of 23 *H.* 8. *cap.* 1. exempt from the benefit of clergy, but not manſlaughter. 4. In the form of the pardon of murder, for tho at common law a pardon of all felonies had pardond murder; yet by the ſtatute of 13 *R.* 2. *cap.* 1. the pardon of murder muſt either be by the expreſs word of *murder*, or elſe it muſt be a pardon of *felonica interfectio*

terfectio with a ſpecial *non obſtante* of the ſtatutes of 13 *R.* 2. *H.* 1 *Jac. Lucas*'s caſe. (*a*)

But the pardon of manſlaughter may be general by the words of *felonia* or *felonica interfectio*, and hence it is, that if a man indicted of murder obtains a pardon of felony, or *felonica interfectio* only, and be afterwards arraigned upon an indictment of murder, he muſt plead *quoad murdrum & interfectionem ex malitiâ præcogitatâ* not guilty, and as to the felony and interfection muſt plead his pardon; and then if the jury being charged to inquire of the plea of *not guilty*, find it to be only a ſimple felony and interfection without malice forethought, his pardon is to be allowd; and thus upon good deliberation it was done in the year 1668. at *Norwich*, Sir *Thomas Potte*'s caſe, and is purſuant to the ſtatute of 13 *R.* 2. which ſaith, "That before a pardon of felonies ſhall "be allowed as to murder, it ſhall be inquired by good in-"queſt, if he were ſlain by await or malice prepenſed." And I remember very well in the caſe of *Rutaby*, *T.* 1653. who was indicted of murder in *Durham*, the defendant pleaded a pardon of *felonica interfectio*, and a general *non obſtante* of all ſtatutes; and the attorney general demurred: it was ruled, 1. That the pardon was inſufficient with only a general *non obſtante*, unleſs murder had been containd in the body of the pardon by expreſs words. 2. But tho the pardon was diſallowd as to murder, yet the priſoner was remitted into *Durham* to be tried, whether guilty of murder, and being ſo found was executed; but had it been found only manſlaughter, he ſhould have been diſcharged, and altho his plea of the pardon to the indictment of murder was diſallowd, yet it had ſtood good, if the conviction were of manſlaughter: by the ſtatute of 1 *Jac. cap.* 8. "Any perſon that ſhall ſtab or thruſt "any perſon, that hath not any weapon drawn, or hath not "firſt ſtricken the party, that ſhall ſo ſtab or thruſt, if the "party die within ſix months, the offender is ouſted of cler-"gy, provided it ſhall not extend to him, that kills *ſe defen-"dendo*, or by misfortune, or in preſerving the peace, or "chaſtizing his child or ſervant.

This

(*a*) *Moor*, *n.* 1033. *p.* 732.

This act, tho but temporary, is continued till ſome other act of parliament ſhall be made touching the continuance or diſcontinuance thereof. 17 *Car.* I. *cap.* 4.

The uſe hath been in caſes of this nature to prefer two indictments againſt offenders in this kind, *viz.* one of murder, another upon this ſtatute, and put the priſoner to plead to both, and to charge the jury firſt with the indictment of murder, and if they find it not to be murder, then to charge them to inquire upon the other bill, becauſe, if convict upon either, the offender is ouſted of clergy.

The indictment to put the priſoner from his clergy muſt be ſpecially formed purſuant to the ſtatute, *viz.* that he did with a ſword, *&c.* ſtab the party dead, he having no weapon drawn, nor having ſtruck firſt, otherwiſe it will be but a common manſlaughter, and the party will have his clergy.

The indictment need not conclude *contra formam ſtatuti*, no more than in burglary or robbery, for the ſtatute doth not make the offenſe to be felony, but ouſts the priſoner of his clergy, where the crime is ſo circumſtantiated as the ſtatute expreſſeth; this was agreed in the caſe of *Page* and *Harwood*, *H.* 23 *Car.* 1. *B. R.* (*b*)

But yet it doth not vitiate the indictment, tho it do conclude, *Et ſic interfecit contra formam ſtatuti*, as was adjudged *Trin.* 9 *Jac. B. R. Bradley* and *Banks* (*c*); and accordingly for the moſt part to this day the indictments upon this ſtatute do conclude *contra formam ſtatuti*, ſo it is good with or without ſuch concluſion, but it is beſt to follow the common uſage, becauſe every man doth not readily obſerve the reaſon of the omiſſion of that concluſion.

In the caſe of *Page* and *Harwood*, *H.* 23 *Car.* 1. before cited, theſe points were reſolved in the king's bench, *viz.*

1. That no man is ouſted of his clergy by this ſtatute, but he that actually ſtabs, and therefore thoſe, that are laid in the indictment to be preſent, aiding, and abetting in ſuch a caſe, ſhall be admitted to the benefit of clergy; and therefore, tho

(*b*) In this caſe, as reported in *Styles* 86. it is not agreed to be ſo, on the contrary it was denied *per Roll*, and doubted *per Bacon*.

(*c*) *Cro. Jac.* 283.

the indictment of ſuch a manſlaughter be ſpecially formed upon the ſtatute, and conclude *contrà formam ſtatuti*, yet it is a good indictment of manſlaughter againſt them, that were preſent, aiding, and abetting, and therefore upon ſuch a ſpecial indictment of manſlaughter upon the ſtatute, the priſoner may be convict of ſimple manſlaughter, and acquitted of manſlaughter upon the ſtatute, and the indictment ſerves for a common manſlaughter, as well as a man upon an indictment of murder may be acquit of murder, and convict of manſlaughter.

22 *Martii*, 14 *Car.* 1. At *Newgate* ſeſſions *David Williams* was indicted ſpecially upon this ſtatute for the death of *Francis Marbury* (*d*), *viz. Quod felonicè &c. unum malleum de ferro & ligno, anglice* an hammer of wood and iron *è manu ſuâ dextrâ erga & ad anteriorem partem capitis ipſius* Franciſci *felonicè violenter & in furore ſuo projecit, & cum malleo prædicto ipſum* Franciſcum *in & ſuper anteriorem partem capitis &c. percuſſit & pupugit, anglice* did ſtab and thruſt the ſaid *Marbury* having no weapon drawn, nor ſtruck firſt, whereof he preſently died, *& ſic modo & formâ prædictâ interfecit &c. contra formam ſtatuti &c.* The priſoner pleaded not guilty, and a ſpecial verdict was found, *viz.* that upon *St. David's* day the priſoner being a *Welſhman* had a leek in his hat, and that there was at the ſame time in waggery a *Jack-a-lent* in the ſtreet put up with a leek, and one *Nicholas Redman*, a porter, ſpake to the priſoner, and pointing to the *Jack-a-lent* ſaid, *Look at your countryman*, and the priſoner being therewith enraged, threw an hammer at *Redman* to the intent felonioufly to hit him, but miſſing him, the hammer did hit *Francis Marbury*, whereof he died, *& ſic prædictus* David *præfatum* Franciſcum *cum malleo prædicto pupugit & percuſſit*, anglice *did ſtab and thruſt*, the ſaid *Francis* then not having any weapon drawn, nor then having firſt ſtricken the ſaid *David*; and it was judged by *Bramſton*, *Jones*, and the recorder *Gardiner*, that *Williams* was guilty of manſlaughter at the common law, *ſed non contra formam ſtatuti*, ſo that it ſeems they thought not this to be a ſtabbing within the ſtatute, being done with the throwing of

(*d*) *W. Jones* 432.

the hammer, or at leaſt they took this killing of *Marbury*, which was not at all intended by *Williams*, to be out of the ſtatute, tho it excuſed him not for manſlaughter at common law. (*e*)

The words of the ſtatute are *ſtab or thruſt*, if the ſtabbing or thruſting were with a ſword, or with a pikeſtaff, it is within the ſtatute, ſo it ſeems, if it be a ſhot with a piſtol, or a blow with a ſword or ſtaff, yet *quere*, for *Jones* juſtice denied it.

In *M.* 5 *Jac.* it was ruled, that if the party ſlain had a cudgel in his hand, it is a weapon drawn within this ſtatute, and the priſoner was admitted to his clergy at *Newgate*; but it ſeems it muſt be intended of ſuch a cudgel, as might probably do hurt, not a ſmall riding-rod or cane.

In the year 1657. (*f*) at *Newgate* before *Glynn*, who then ſat as chief juſtice, a man was indicted upon this ſtatute, and a ſpecial verdict found, that a bailiff having a warrant to arreſt a man, preſſed early into his chamber with violence, but not mentioning his buſineſs, nor the man knowing him to be a bailiff, nor that he came to make an arreſt, ſnatched down a ſword, that hanged in his chamber, and ſtabbed the bailiff, whereof he preſently died: there was ſome diverſity of opinion among the judges, whether this were within the ſtatute, but at length the priſoner was admitted to his clergy, for tho this caſe was within the words of the ſtatute, and not within the particular exceptions, yet it was held, that this caſe was never intended in the ſtatute, for the priſoner did not know, but that the party came in to rob or kill him, when he thus violently brake into his chamber without declaring his buſineſs. (*g*)

2 CHAP.

(*e*) Lord chief juſtice *Holt* in *Mawgridge*'s caſe, *Kel.* 131. concurs with this judgment, for that it was not ſuch a weapon or act, as is within the ſtatute of ſtabbing, but he is of opinion, that *Williams* ought to have been found guilty of murder, if the indictment had been ſo laid, for that there was not a ſufficient provocation to leſſen the offenſe to manſlaughter.

(*f*) *Quere*, whether the caſe here meant be not *Buckner*'s caſe, *M.* 1655. reported in *Styles* 467. but that, as it is there reported, was not the caſe of a bailiff, but of a creditor, who ſtood at the door with a ſword undrawn to keep the debtor in, till they could ſend for a bailiff, and was kild by the debtor.

(*g*) See *Kel.* 136.

CHAP. XXXIX.

Touching involuntary homicide, *and firſt of* chance-medley *or* killing *per infortunium.*

INvoluntary homicide is the death or hurt of the perſon of a man againſt or beſides the will of him that kills him.

And in theſe caſes, to ſpeak once for all, the indictment itſelf muſt find the ſpecial matter, or in caſe the indictment be of murder or manſlaughter, and upon the trial it appears to the jury it was involuntary, (as by misfortune, or in his own defenſe) the jury ought to find the ſpecial matter, and ſo conclude, *Et ſic per infortunium*, or *ſe defendendo*, and not generally, that it was *per infortunium*, or *ſe defendendo*, becauſe the court muſt judge upon the ſpecial matter, whether it be murder, homicide, or *per infortunium*, or *ſe defendendo*, and the jury is only to find the fact, and leave the judgment thereupon to the court; and in ſuch caſe the priſoner muſt not plead the ſpecial matter, and ſo juſtify, but muſt plead not guilty, and the ſpecial matter muſt be found by the jury, *Stamf. P. C. Lib.* I. *cap.* 7. *fol.* 15. *a. Lib.* III. *cap.* 9. *fol.* 165. *a.* for upon the ſpecial matter found the court may give judgment againſt the concluſion of the verdict, as that the fact is manſlaughter, tho the concluſion of the verdict be *per infortunium*, or *ſe defendendo.* 44 *E.* 3. *Coron.* 94.

This involuntary homicide is of two kinds, *viz.* either 1. When it is purely involuntary and caſual, as the killing of a man *per infortunium*, or 2. When it is partly involuntary, and partly voluntary, but occaſiond by a neceſſity, that the law allows, which is commonly called homicide *ex neceſſitate*, as killing a man in his own defenſe, or the like; *de quibus poſtea.*

Homicide

Homicide *per infortunium* is, where a man is doing a lawful act, and without intention of bodily harm to any perſon, and by that act death of another enſues, as if a man be ſhooting at buts or pricks, and by caſualty his hand ſhakes, and the arrow kills a by-ſtander. 21 *H.* 7. 28. *a.* 6 *E.* 4. 7. *b.*

Or if a carpenter or maſon in building caſually let fall a piece of timber or ſtone, and kills another. 21 *H.* 7. *B. Coron.* 59.

But if he voluntarily let it fall, whereby it kills another, if he give not due warning to thoſe that are under, it will be at leaſt manſlaughter; *quia debitam diligentiam non adhibuit.*

So if a man be felling a tree in his own ground, and it fall and kill a perſon, it is chance-medley. 6 *E.* 4. 7.

But in all theſe caſes, if it doth only hurt a man by ſuch an accident, it is nevertheleſs a treſpaſs, and the perſon hurt ſhall recover his damages, for tho the chance excuſe from felony, yet it excuſeth not from treſpaſs. 6 *E.* 4. 7.

Regularly he that voluntarily and knowingly intends hurt to the perſon of a man, tho he intend not death, yet if death enſues, it excuſeth not from the guilt of murder, or manſlaughter at leaſt, as if *A.* intends to beat *B.* but not to kill him, yet if death enſues, this is not *per infortunium*, but murder or manſlaughter, as the circumſtances of the caſe happen.

And therefore I have known it ruled, that if two men are playing at cudgels together, or wreſtling by conſent, if one with a blow or fall kill the other, it is manſlaughter, and not *per infortunium*, tho Mr. *Dalton*, *cap.* 96. (*a*) ſeems to doubt it; and accordingly it was reſolved P. 2 *Car.* 2. by all the judges upon a ſpecial verdict from *Newgate*, where two friends were playing at foils at a fencing ſchool, one caſually kild the other; reſolved to be manſlaughter.

Sir *John Chicheſter*, and his man-ſervant, whom he very well loved, were playing together, the man had a bedſtaff in his hand, and Sir *John* had his rapier in the ſcabbard, Sir *John*, according to the uſual ſport between them, bids his man guard his thruſt or paſs, which he was making at him

2 with

(*a*) *New Edit. cap.* 148. *p.* 479.

with his rapier in the ſcabbard, the ſervant with the bedſtaff brake the thruſt, but withal ſtruck off the chape of the ſcabbard, whereby the end of the rapier came out of the ſcabbard, but the thruſt was not ſo effectually broken, but the end of the rapier prickt the ſervant in the groin, whereof he died: Sir *John Chicheſter* was for this indicted of murder, and tried at the king's bench bar, where all this evidence was given; and it was ruled, 1. That it was not murder, tho the act itſelf was not lawful, becauſe there was no malice or ill will between them. 2. That it was not barely chance-medley, or *per infortunium*, becauſe altho the act, which occaſiond the death, intended no harm, nor could it have done harm, if the chape had not been ſtricken off by the party kild, and tho the parties were in ſport, yet the act itſelf, the thruſting at his ſervant, was unlawful, and conſequently the death, that enſued thereupon, was manſlaughter, and was accordingly found and adjudged, which I heard 23 *Car.* I. (*b*), 11 *H.* 7. 23. *a. Kelw.* 108, 136.

But if two play at barriers, or run a-tilt without the king's commandment, and one kill the other, it is manſlaughter; but if it be by the king's command, it is not felony, or at moſt *per infortunium*. 11 *H.* 7. 23. *B. Coron.* 229. *Dalton, cap.* 96. *Co. P. C. p.* 56. (*c*)

If *A.* come into the wood of *B.* and pull his hedges, or cut his wood, and *B.* beat him, whereof he dies, this is manſlaughter, becauſe, tho it was not lawful for *A.* to cut the wood, it was not lawful for *B.* to beat him, but either to bring him to a juſtice of peace, or puniſh him otherwiſe according to law.

But if a ſchool-maſter correct his ſcholar, or a maſter his ſervant, or a parent his child, and by ſtrugling, or otherwiſe,

(*b*) *Aleyn* 12. This ſeems a very hard caſe, and indeed the foundation of it fails, for the puſhing with a ſword in the ſcabbard by conſent ſeems not to be an unlawful act, for it is not a dangerous weapon likely to occaſion death, nor did it do ſo in this caſe but by an unforeſeen accident, and therein differs from the caſe of juſting, (or prize-fighting) where-in ſuch weapons are made uſe of, as are fitted, and likely to give mortal wounds.

(*c*) *Brooke*, after having taken notice of this as *Fineux*'s opinion, ſays, That other juſtices in the time of *Henry* VIII. denied this, and held it felony to kill a man in juſting, or ſporting after that manner, notwithſtanding the king's command, *for ſuch command is againſt law.*

the child or ſcholar, or ſervant die, this is only *per infortunium. Crompt. Juſt.* 28. *b.*

But this is to be underſtood, when it happens only upon moderate correction, for if the correction be with an unfit inſtrument (*d*), or too outragious, then it is murder, as it happend in a caſe at *Norwich* aſſizes 1670. where the maſter ſtruck a child, that was his apprentice, with a great ſtaff, of which it died, it was ruled murder.

Several perſons come to enter the houſe of *A.* as treſpaſſers, *A.* ſhoots and kills one, this is manſlaughter, otherwiſe it had been, if they had entred to commit a felony. *Crompt. de Pace, fol.* 29. *a. Harcourt*'s caſe.

But in the caſe of *Levet* indicted for the death of *Frances Freeman*, the caſe was, That *William Levet* being in bed and aſleep in the night in his houſe, his ſervant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the ſervant going to let out *Frances* thought ſhe heard thieves breaking open the door, ſhe therefore ran up ſpeedily to her maſter, and informed him, that ſhe thought thieves were breaking open the door, the maſter riſing ſuddenly, and taking a rapier ran down ſuddenly, *Frances* hid herſelf in the buttery leſt ſhe ſhould be diſcoverd, *Levet*'s wife ſpying *Frances* in the buttery, and not knowing her cried out, *Here they be that would undo us, Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thruſting with his rapier before him hit *Frances* in the breaſt mortally, whereof ſhe inſtantly died: this was reſolved to be neither murder, nor manſlaughter, nor felony: *vide* the caſe cited by juſtice *Jones*, *P.* 15 *Car.* 1. *B. R.* and *Croke*, *n.* 1. (in *Cook*'s caſe (*e*) for killing a bailiff, that broke a window to execute a *Capias*, which was judged to be manſlaughter;) where the book ſays it was not felony, *quære* whether it be not homicide by miſadventure, for the party kild was in truth no thief, tho miſtaken for one, and tho it be not homicide voluntary, yet it ſeems to be *per infortunium.*

I If

(*d*) As with a bar of iron, or a ſword, or a great cudgel, *Kel.* 64, 133.

(*e*) *Cro. Car.* 538. *W. Jones* 429.

If a man knowing that people are paſſing along the ſtreet throws a ſtone, or ſhoots an arrow over the houſe or wall with intent to do hurt to people, and one is thereby ſlain, this is murder, and if it were without ſuch intent, yet it is manſlaughter, and not barely *per infortunium*, becauſe the act itſelf was unlawful; but if the man were tiling an houſe, and let fall a tile knowingly, and gave warning, and yet a perſon is kild, this is *per infortunium*, but if he gave not convenient warning, it is manſlaughter, *quia non adhibuit debitam diligentiam.* (*f*)

If *A.* in his own park ſhoot at a deer, and the arrow glancing againſt a tree hits and kills *B.* this is homicide *per infortunium*, becauſe it was lawful for him to ſhoot in his own park.

But if *A.* without the licence of *B.* hunt in the park of *B.* and his arrow glancing from a tree, killeth a by-ſtander, to whom he intended no hurt, this is manſlaughter, becauſe the act was unlawful.

So if *A.* throw a ſtone at a bird, and the ſtone ſtriketh and killeth another, to whom he intended no harm, it is *per infortunium.*

But if he had thrown a ſtone to kill the poultry or cattle of *B.* and the ſtone hit and kill a by-ſtander, it is manſlaughter, becauſe the act was unlawful, but not murder, becauſe he did it not maliciouſly, or with an intent to hurt the by-ſtander.

By the ſtatute of 33 *H.* 8. *cap.* 6. "No perſon not having "lands, *&c.* of the yearly value of one hundred pounds *per* "*annum* may keep or ſhoot in a gun upon pain of forfeiture "of ten pounds." Suppoſe therefore ſuch a perſon not qualified ſhoots with a gun at a bird, or at crowes, and by miſchance it kills a by-ſtander by the breaking of the gun, or ſome other accident, that in another caſe would have amounted only to chance-medley, this will be no more than chance-medley in him, for tho the ſtatute prohibit him to keep

(*f*) This is upon ſuppoſition, that the houſe do not ſtand near an highway or place of reſort, for then, tho he ſhould cry out firſt, it is manſlaughter. See *Hull's* caſe 1664. *Kel.* 40.

keep or uſe a gun, yet the ſame was but *malum prohibitum*, and that only under a penalty, and will not inhanſe the effect beyond its nature.

A. having deer frequenting his corn-field out of the precinct of any foreſt or chace ſets himſelf in the night-time to watch in a hedge, and ſets *B.* his ſervant to watch in another corner of the field with a gun charged with bullets, giving him order to ſhoot, when he hears any buſtle in the corn by the deer, the maſter himſelf improvidently ruſhes into the corn, the ſervant ſuppoſing it to be the deer ſhoots, and thereby kills his maſter in the night, this is neither petit treaſon, murder, nor manſlaughter, but chance-medley, for the ſervant was miſguided by his maſter's own direction, and was ignorant, that it was any thing elſe but the deer. This was my opinion in a caſe happening at *Peterborough* ſeſſion; but it ſeemed to me, that if the maſter had not given ſuch direction, that was the occaſion of his miſtake, it would have been manſlaughter to have ſhot at a man, tho by miſtaking it for the deer, becauſe he did not *adhibere debitam diligentiam* to diſcover his mark, but ſhot directly at the perſon of a man, tho miſtaking it for a deer.

A. drives his cart careleſly, and it runs over a child in the ſtreet, if *A.* have ſeen the child, and yet drives on upon him, it is murder; but if he ſaw not the child, yet it is manſlaughter; but if the child had run croſs the way, and the cart run over the child before it was poſſible for the carter to make a ſtop, it is *per infortunium*, and accordingly this direction was given by us at *Newgate* ſeſſions in 1672. and the carter convict of manſlaughter.

If a man or boy riding in the ſtreet whip his horſe to put him into ſpeed, and run over a child and kill him, this is homicide, and not *per infortunium*, and if he rid ſo in a preſs of people with intent to do hurt, and the horſe had kild another, it had been murder in the rider.

But if a man or boy be riding in the ſtreet, and a by-ſtander whip the horſe, whereby he runs away againſt the will of the rider, and in his courſe runs over and kills a child or man, it is chance-medley only, and in that caſe the jury

ought not to find him *not guilty* generally, but the ſpecial matter; but yet, becauſe the coroner's inqueſt, which ſtood untraverſed, had found the ſpecial matter, the court received the verdict of *not guilty* upon the indictment by the grand inqueſt of murder, and the party confeſſed the indictment by the coroner, and had his pardon of courſe, and this was ſaid by *Lee* ſecondary to be the courſe at *Newgate*, 1 *Sept.* 16. *Car.* 2. *Richard Pretty*'s caſe.

Tho the killing of another *per infortunium* be not in truth felony, nor ſubjects the party to a capital puniſhment, and therefore uſually in ſuch caſes the verdict concludes, *quod interfecit per infortunium, & non per feloniam*, yet the party forfeits his goods, and tho he ought to have *quaſi de jure* a pardon of courſe upon the certificate of the conviction, yet he is not to be diſcharged out of priſon, but bailed till the next term or ſeſſions to ſue out his pardon of courſe, for tho it was not his crime, but his misfortune, yet becauſe the king hath loſt his ſubject, and that men may be the more careful, he forfeits his goods, and is not preſently abſolutely diſcharged of his impriſonment, but bailed, *ut ſupra.*

And ſo ſtrict was the judicial law of the *Jews* in relation to the life of man, that even in this caſe the avenger of blood might kill the manſlayer *per infortunium* before he got to the city of refuge, *Deut.* xix. 5, 6.

CHAP. XL.

Of manſlaughter ex neceſſitate, *and firſt* ſe defendendo.

I Come to thoſe homicides, that are *ex neceſſitate*, and this neceſſity makes the homicide not ſimply voluntary, but mixed, partly voluntary and partly involuntary, and is of two kinds.

1. That neceſſity, which is of a private nature.

2. That neceſſity, which relates to the public juſtice and ſafety.

The former is that neceſſity, which obligeth a man to his own defenſe and ſafeguard, and this takes in theſe inquiries,

1. What may be done for the ſafeguard of a man's own life.
2. What may be done for the ſafeguard of the life of another.
3. What may be done for the ſafeguard of a man's goods.
4. What may be done for the ſafeguard of a man's houſe of habitation.

I. As touching the firſt of theſe, *viz.* homicide in defenſe of a man's own life, which is uſually ſtyled *ſe defendendo*.

It is generally to be obſerved, that in caſe of any indictment or charge of felony the priſoner cannot plead any thing by way of juſtification, as that he did it in his own defenſe, or *per infortunium*, but muſt plead *not guilty*; and upon his trial the ſpecial matter is to be found by the jury, and thereupon the court gives judgment.

Homicide *ſe defendendo* is of two kinds.

1. Such, as tho it excuſe from death, yet it excuſeth not the forfeiture of goods, nor is the party to be abſolutely diſcharged out of priſon, but bailed, and to purchaſe his pardon of courſe.

2. Such as wholly acquits from all kinds of forfeiture.

Firſt therefore of common homicide *ſe defendendo.*

Homicide *ſe defendendo* is the killing of another perſon in the neceſſary defenſe of himſelf againſt him, that aſſaults him.

In this caſe of homicide *ſe defendendo* there are theſe circumſtances obſervable.

1. It is not neceſſary, that the party kild be the firſt aggreſſor or aſſailant, or of his party, tho commonly it holds.

There is malice between *A.* and *B.* they appoint a time and place to fight, and meet accordingly, *A.* gives the firſt onſet, *B.* retreats as far as he can with ſafety, and then kills *A.* who had otherwiſe kild him; this is murder, for they met by compact and deſign, and therefore neither ſhall have the advantage of what they themſelves each of them created.

There is malice between *A.* and *B.* they meet caſually; *A.* aſſaults *B.* and drives him to the wall, *B.* in his own defenſe kills *A.* this is *ſe defendendo*, and ſhall not be heightend by the former malice into murder or homicide at large, *Copſton's* caſe cited *Crompt. de Pace* 27. *b.* and *Dalt. cap.* 98. (*a*), for it was not a killing upon the account of the former malice, but upon a neceſſity impoſed upon him by the aſſault of *A.*

A. aſſaults *B.* and *B.* preſently thereupon ſtrikes *A.* without flight, whereof *A.* dies, this is manſlaughter in *B.* and not *ſe defendendo*, 43 *Aſſiz.* 31. but if *B.* ſtrikes *A.* again, but not mortally, and blows paſs between them, and at length *B.* retires to the wall, and being preſſed upon by *A.* gives him a mortal wound, whereof *A.* dies, this is only homicide *ſe defendendo*, altho that *B.* had given divers other ſtrokes, that were not mortal before he retired to the wall, or as far as he could. *Stamf. P. C. Lib.* I. *cap.* 7. *fol.* 15. *a. Dalt. cap.* 98. *Cromp.* 28. *a.*

But now ſuppoſe, that *A.* by malice makes a ſudden aſſault upon *B.* who ſtrikes again, and purſuing hard upon *A.* *A.* retreats to the wall, and in ſaving his own life kills *B.* ſome have held this to be murder, and not *ſe defendendo*, becauſe *A.* gave the firſt aſſault, *Cromp. fol.* 22. *b.* grounding upon the book of 3 E. 3. *Itin. North. Coron.* 287. but Mr. *Dal-*

(*a*) *New Edit. cap.* 190. *p.* 484.

Mr. *Dalton*, *ubi ſupra*, thinketh it to be *ſe defendendo* (*b*), tho *A.* made the firſt aſſault, either with or without malice, and then retreated; therefore the book of 3 *E.* 3. *Coron.* 284, 287. which occaſiond the doubt, is to be examined, which is thus.

It ſeems to me, that if *A.* did retreat to the wall upon a real intent to ſave his life, and then merely in his own defenſe kild *B.* that it is *ſe defendendo*, and with this agrees *Stamf. P. C. Lib.* I. *cap.* 7. *fol.* 15. *a.* But if on the other ſide *A.* knowing his advantage of ſtrength, or ſkill, or weapon, retreated to the wall merely as a deſign to protect himſelf under the ſhelter of the law, as in his own defenſe, but really intended the killing of *B.* then it is murder, or manſlaughter, as the circumſtance of the caſe requires, and that was the reaſon, why the judges demanded of the jury 3 *E.* 3. whether he kild *B.* of malice, or otherwiſe to ſave himſelf, and when the jury anſwered, *It was to ſave his life*, he was remitted to priſon to have his pardon of courſe. 3 *E.* 3. *Coron.* 284, 287.

2. In homicide *ſe defendendo* there ſeems neceſſary ſome act to be done by the party killing, for if he be merely paſſive, this will make it only a killing *per infortunium.*

A. aſſaults *B.* who flies to the wall, or falls, holding his ſword, knife or pike in his hand, *A.* runs violently, or falls upon the knife of *B.* without any thruſt or ſtroke offerd at him by *B.* and thereupon dies, this is death *per infortunium*,

4 and

(*b*) The caſe here referd to in *Dalton* is the caſe of an affray, (which is likewiſe the caſe put by *Stamford*) of this he ſays there was a difference of opinions, but delivers no opinion of his own, but as to the caſe here put by our author of a *malicious* aſſault, which he afterwards mentions, he ſeems plainly to be of the contrary opinion, and to think it murder; nor do I ſee any thing in *Coron.* 284, 287. that could occaſion any doubt about this matter, or any way relates to this caſe, for both thoſe caſes (which ſeem to be but one and the ſame) were of an affray, in which he, that ſtruck firſt, was the party kild, and the party killing ſtruck not at all, till after he had fled as far as he could, and was neceſſitated to do it in his own defenſe; ſo that the reaſon aſſigned by our author for demanding the queſtion of the jury is grounded on a miſtake; that, which to me ſeems the reaſon of putting that queſtion to the jury, is this, the jury had found the fact ſpecially, but had not drawn any general concluſion from it, the queſtion was therefore asked, that they might make the uſual concluſion, *unde dicunt*, *quod prædictus* A. (the defendant) *ſe defendendo prædictum* B. (the deceaſed) *interfecit, & non per felonium aut malitiam præcogitatam*, which was done accordingly; and therefore in the firſt of thoſe places, *viz. Coron.* 284. the uſual concluſion being inſerted, no notice is taken of the queſtion put to the jury.

and ſome have ſaid, that in this caſe *A.* is *felo de ſe, de quo antea, vide Stamf. P. C. Lib.* I. *cap.* 7. *p.* 16. *& libros ibi.*

3. Regularly it is neceſſary, that the perſon, that kills another in his own defenſe, fly as far as he may to avoid the violence of the aſſault before he turn upon his aſſailant, for tho in caſes of hoſtility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in caſes of aſſaults and affrays between ſubjects under the ſame law, the law owns not any ſuch point of honour, becauſe the king and his laws are to be the *vindices injuriarum*, and private perſons are not truſted to take capital revenge one of another.

But this hath ſome exceptions.

1. In reſpect of the perſon killing.

If a gaoler be aſſaulted by his priſoner, or if the ſheriff or his miniſter be aſſaulted in the execution of his office, he is not bound to give back to the wall, but if he kill the aſſailant, it is in law adjudged *ſe defendendo*, tho he give not back to the wall; the like of a conſtable or watchman, for they are miniſters of juſtice, and under a more ſpecial protection in the execution of their office, than private perſons. *Co. P. C. p.* 56. 9 *Co. Rep.* 68. *b. Mackally's* caſe.

But if the priſoner makes no reſiſtance, but flies, yet the officer, either for fear, that he or ſome other of his party will reſcue the priſoner, ſtrikes the priſoner, whereof he dies, this is murder, for here was no aſſault firſt made by the priſoner, and ſo it cannot be *ſe defendendo* in the officer.

And here is the difference between civil actions and felonies.

If a man be in danger of arreſt by a *Capias* in debt or treſpaſs, and he flies, and the bailiff kills him, it is murder, but if a felon fly, and he cannot be otherwiſe taken, if he be kild, it is no felony, and in that caſe the officer ſo killing forfeits nothing, but the perſon ſo aſſaulted and kild forfeits his goods. *See Foſt. Crow. Law 271.*

2. In relation to the perſon kild.

If a thief aſſault a true man either abroad or in his houſe to rob or kill him, the true man is not bound to give back, but may kill the aſſailant, and it is not felony. *Co. P. C. p.* 56.

3. In reſpect of the manner of the aſſault.

If *A.* aſſault *B.* ſo fiercely, that *B.* cannot ſave his life if he give back, or if in the aſſault *B.* fall to the ground, whereby he cannot fly, in ſuch caſe if *B.* kills *A.* it is *ſe defendendo*, *Co. P. C. p.* 56. but now here will be occaſion to reſume the former debate, where the firſt aſſailer may be ſaid to kill the aſſailed *ſe defendendo.*

If *A.* aſſault *B.* and *B.* thereupon reaſſault *A.* and *A.* really flies to avoid the aſſault of *B.* who purſues him, and then *A.* being driven to the wall turns again and kills *B.* it ſeems this may be *ſe defendendo*, as hath been ſaid, for it appears *de facto*, that *A.* fled from the aſſault of *B.* till he could fly no farther.

But if *A.* aſſaults *B.* firſt, and upon that aſſault *B.* reaſſaults *A.* and that ſo fiercely, that *A.* cannot retreat to the wall or other *non ultra* without danger of his life, nay, tho *A.* fall upon the ground upon the aſſault of *B.* and then kills *B.* this ſhall not be interpreted to be *ſe defendendo* (*c*), but to be murder, or ſimple homicide, according to the circumſtances of the caſe, for otherwiſe we ſhould have all caſes of murders or manſlaughters by way of interpretation turned into *ſe defendendo.*

The party aſſaulted indeed ſhall by the favourable interpretation of the law have the advantage of this neceſſity to be interpreted as a flight (*d*) to give him the advantage of *ſe defendendo*, when the neceſſity put upon him by the aſſailant makes his flight impoſſible; but he, that firſt aſſaulted, hath done the firſt wrong, and brought upon himſelf this neceſſity, and ſhall not have advantage of his own wrong to gain the favourable interpretation of the law, that that neceſſity, which he brought upon himſelf, ſhould by way of interpretation be accounted a flight to ſave himſelf from the guilt of murder or manſlaughter.

4 If

(*c*) Becauſe his fall not being voluntary, as a flight is, it does not appear, that he declined fighting, ſo that the party firſt aſſaulted cannot ſafely quit the advantage he has got.

(*d*) Not that the law eſteems this neceſſity to be a flight, but the party not having opportunity of flying, the law does not require it of him; but excuſes him in the ſame manner, as if he had fled.

If *A.* after the aſſault had really and *bonâ fide* fled from *B.* or that they had been parted by by-ſtanders, that had given a kind of interruption to the affray, and a declining of any farther affray by *B.* and therefore when *B.* purſues him to kill him, and *A.* after his flight, upon neceſſity of ſaving his life, kills *B.* this is apparent to be *ſe defendendo*, but when it is done altogether without any interval of flight or parting, and *B.* that was firſt aſſaulted, gains the preſent advantage by his ſtrength, courage or fortune, to preclude the flight of *A.* and then *A.* kills him, this ſeems to be manſlaughter, and not *ſe defendendo.*

And it muſt be obſerved, that the flight to gain the advantage of *ſe defendendo* to the party killing muſt not be a feigned flight, or a flight to gain advantage of breath, or opportunity to fall on afreſh, as fighting cocks retire to gain advantage, but it muſt be a flight from the danger, as far as the party can, either by reaſon of ſome wall, ditch, company, or as the fierceneſs of the aſſailant will permit.

In *Fleet-ſtreet A.* and *B.* were walking together, *B.* gave ſome provoking language to *A.* who thereupon gave *B.* a box on the ear, they cloſed, *B.* was thrown down, and his arm broken, he runs to his brother's houſe preſently, which was hard by, *C.* his brother taking the alarm came out with his ſword drawn, and made towards *A.* who retreated ten or twelve yards, *C.* purſued him, *A.* drew his ſword and made a paſs at *C.* and kild him, *A.* being indicted at *Newgate* ſeſſions for murder, the court directed the jury upon the trial to find this manſlaughter, not murder, becauſe upon a ſudden falling out; not *ſe defendendo*, partly becauſe *A.* made the firſt breach of the peace by ſtriking *B.* and partly becauſe, unleſs he had fled as far as might be, it could not by way of interpretation be ſaid to be in his own defenſe; and it appeard plainly upon the evidence, that he might have retreated out of danger, and his ſtepping back was rather to have an opportunity to draw his ſword, and with more advantage to come upon *C.* than to avoid him; and accordingly at laſt it was found manſlaughter 1671. at *Newgate.*

II. I come to the ſecond conſideration, namely what the offenſe is, if a man kill another in the neceſſary ſaving of the life of a man aſſaulted by the party ſlain.

A. aſſaults the maſter, who flies as far as he can to avoid death, the ſervant kills *A.* in defenſe of his maſter; this is homicide *defendendo* of the maſter, and the ſervant ſhall have a pardon of courſe, 21 *H.* 7. 39. *a.* but if the maſter had not been driven to that extremity, it had been manſlaughter at large in the ſervant, if he had no precedent malice in him. *Plowd. Com.* 100.

The like law had been for a maſter killing in the neceſſary defenſe of his ſervant, the huſband in the defenſe of the wife, the wife of the huſband, the child of the parent, or the parent of the child, for the act of the aſſiſtant ſhall have the ſame conſtruction in ſuch caſes, as the act of the party aſſiſted ſhould have had, if it had been done by himſelf, for they are in a mutual relation one to another.

If *A.* and *B.* and *C.* be of a company together, and walking in the field *C.* aſſaults *B.* who flies, *C.* purſues him, and is in danger to kill him, unleſs preſent help, *A.* thereupon kills *C.* in defenſe of the life of *B.* it ſeems that in this caſe of ſuch an inevitable danger of the life of *B.* this occiſion of *C.* by *A.* is in nature of *ſe defendendo*; but then it muſt appear plainly by the circumſtances of the caſe, as the manner of the aſſault, the weapon, with which *C.* made the aſſault, *&c.* that the imminent danger of the life of *B.* be apparent and evident.

And the reaſon ſeems to be, becauſe every man is bound to uſe all poſſible lawful means to prevent a felony, as well as to take the felon, and if he doth not, he is liable to a fine and impriſonment, therefore if *B.* and *C.* be at ſtrife, *A.* a by-ſtander is to uſe all lawful means, that he may without hazard of himſelf, to part them, and the very relation of acquaintance, and mutual ſociety between *A. B.* and *C.* ſeems to excuſe the fact of *A.* in the neceſſary ſafeguard of the life of *B.* from the crime of ſimple homicide; *tamen quære.*

If *A.* be travelling, and *B.* comes to rob him, if *C.* falls into the company, he may kill *B.* in defenſe of *A.* and therefore much more, if he come to kill him, and ſuch his intent be

be apparent, for in ſuch caſe of a felony attempted, as well as of a felony committed, every man is thus far an officer, that at leaſt his killing of the attempter in caſe of neceſſity puts him in the condition of *ſe defendendo* in defending his neighbour; but of this more hereafter.

A. makes an aſſault upon *B.* a woman or maid with intent to raviſh her, ſhe kills him in the attempt, it is *ſe defendendo*, becauſe he intended to commit a felony. *Dalt. cap.* 98. *p.* 250.

And ſo it is if *C.* the huſband or father of *B.* had kild him in the attempt, if it could not be otherwiſe prevented, but if it might be otherwiſe prevented, it is manſlaughter, therefore circumſtances muſt guide in that caſe.

III. I come to conſider, what the offenſe is in killing him, that takes the goods, or doth injury to the houſe or poſſeſſion of another.

And herein there will be many diverſities, as firſt between a treſpaſſable act and a felonious act, and between felonious acts themſelves.

If *A.* pretending a title to the goods of *B.* take them away from *B.* as a treſpaſſer, *B.* may juſtify the beating of *A.* but if he beat him ſo that he die, it is neither juſtifiable, nor within the privilege of *ſe defendendo*, but it is manſlaughter. *Dalt. cap.* 98. *p.* 251.

A. is in poſſeſſion of the houſe of *B.* *B.* endeavours to enter upon him, *A.* can neither juſtify the aſſault nor beating of *B.* for *B.* had the right of entry into the houſe, but if *A.* be in poſſeſſion of a houſe, and *B.* as a treſpaſſer enters without title upon him, *A.* may not beat him, but may gently lay his hands upon him to put him out, and if *B.* reſiſt and aſſault *A.* then *A.* may juſtify the beating of him, as of his own aſſault.

But if *A.* kill him in defenſe of his houſe, it is neither juſtifiable, nor within the privilege of *ſe defendendo*, for he entred only as a treſpaſſer, and therefore it is at leaſt common manſlaughter: this was *Harcourt*'s caſe, *Crompt.* 27. *a.* who being in poſſeſſion of a houſe by title, as it ſeems, *A.* endeavoured to enter, and ſhot an arrow at them within the

houſe, and *Harcourt* from within ſhot an arrow at thoſe, that would have entred, and kild one of the company, this was ruled manſlaughter 5 *Eliz.* and it was not *ſe defendendo*, becauſe there was no danger of his life from them without.

But if *A.* had entred into the houſe, and *Harcourt* had gently laid his hands upon him to turn him out, and then *A.* had turned upon him, and aſſaulted him, and *Harcourt* had kild him, it had been *ſe defendendo*, and ſo it had been if *A.* had entred upon him, and aſſaulted him firſt, tho he intended not to kill him, yet if *Harcourt* had thereupon kild *A.* it had been only *ſe defendendo*, and not manſlaughter, tho the entry of *A.* was not with intent to murder him, but only as a treſpaſſer to gain the poſſeſſion, 3 *E.* 3. *Coron.* 305. *Cromp.* 27. *b.* and it ſeems to me in ſuch a caſe *Harcourt* being in his own houſe need not fly, as far as he can, as in other caſes of *ſe defendendo*, for he hath the protection of his houſe to excuſe him from flying, for that would be to give up the poſſeſſion of his houſe to his adverſary by his flight.

A. commits adultery with *B.* the wife of *C.* who comes up and takes them in the very act, and with a ſtaff kills the adulterer upon the place, this is manſlaughter, and neither murder, nor under the privilege of *ſe defendendo*: but if *A.* had been taken by *C.* in the very attempt of a rape upon the wife, and ſhe crying out, her huſband had come and kild *A.* in the act of his raviſhment, it had been within the privilege of *ſe defendendo*, becauſe it was a felony; the former caſe was adjudged manſlaughter by the court, *B. R. M.* 23. *Car.* 2. (*d*)

Now concerning felonies, as there is a difference between them and treſpaſſes, ſo there is a difference among themſelves in relation to the point of *ſe defendendo*.

If a man come to take my goods as a treſpaſſer, I may juſtify the beating of him in defenſe of my goods, as hath been ſaid, but if I kill him, it is manſlaughter.

But if a man come to rob me, or take my goods as a felon, and in my reliſtance of his attempt I kill him, it is *me defendendo* at leaſt, and in ſome caſes not ſo much.

(*d*) *Manning*'s caſe, *Raym.* 212. When he was to be burnt in the hand, the court directed it to be done gently, becauſe they ſaid there could not be a greater provocation.

At common law, if a thief had aſſaulted a man to rob him, and he had kild the thief in the aſſault, it had been *ſe defendendo*, but yet he had forfeited his goods, as ſome have thought, 11 *Co. Rep.* 82. *b.* tho other books be to the contrary. 26 *Aſſiz.* 32.

But if *A.* had attempted a burglary upon the houſe of *B.* to the intent to ſteal, or to kill him, or had attempted to burn the houſe of *B.* if *B.* or any of his ſervants, or any within his houſe had ſhot and kild *A.* this had not been ſo much as felony, nor had he forfeited ought for it, for his houſe is his caſtle of defenſe, and therefore he may juſtify aſſembling of perſons for the ſafeguard of his houſe. 21 *H.* 7. 39. *a.* 11 *Co. Rep.* 82. *b.* 5 *Co. Rep.* 91. *b.* 26 *Aſſiz.* 23. 3 *E.* 3. *Coron.* 330.

But otherwiſe it is, as hath been ſaid in caſe of a treſpaſſable entry into the houſe claiming a title, and not to commit felony.

But now by the ſtatute of 24 *H.* 8. *cap.* 5. "If any perſon "attempt any robbery or murder of any perſon in or near "any common highway, cartway, horſeway, or footway, or "in their manſion-houſes, or do attempt to break any man- "ſion-houſe in the night-time, and ſhall happen to be kild "by any perſon or perſons, *&c.* (tho a lodger or ſervant) "they ſhall upon their trial be acquitted and diſcharged in "like manner, as if he had been acquitted of the death of "ſuch perſon. *P.* 15 *Car.* 1. *Cooper*'s caſe. (*e*)

This ſtatute was to remove a doubt, and was declarative and enacting, and puts the killing of a robber in or near the highway, *&c.* in the ſame condition with one, that intends to rob or murder in the dwelling-houſe, and exempts both from forfeiture, and hath ſettled the doubt.

And upon this ſtatute it was, that when there was malice between *A.* and *B.* and they had fought ſeveral times, and after met ſuddenly in the ſtreet near *Ludgate*, and *A.* ſaid he would fight him, *B.* declined it, and fled to the wall, and called others to witneſs it, and *A.* purſued him, and ſtruck him firſt, and *B.* in his own defenſe kild him, he was acquit from any forfeiture by the ſtatute of 24 *H.* 8. *cap.* 5. 15 *Eliz.* *Cromp.*

(*e*) *Cro. Car.* 544.

Cromp. 27. *b. Copſton*'s caſe: but upon this ſtatute theſe things are obſervable.

1. It extends not to the caſe of a bare treſpaſſable entry into a houſe, but only to ſuch an entry or attempt, as is intended to be for murder or robbery, *&c.* or ſome ſuch felony, and therefore the caſes of treſpaſſes either in houſes or near highways are left as before.

2. It ſeems, that it extends not to indemnify the killing of a felon, where the felony is not accompanied with force, for it ſpeaks of *robbery*, therefore the killing of one, that attempts to pick my pocket, is not within the act, for there is no ſuch neceſſity; indeed, if any felon, after a felony committed, doth reſiſt thoſe, that endeavour to apprehend him, or fly, and be kild, this killing is no felony, but that is upon another account, for this ſtatute hath relation only to killing before, or in the felony committed, not after.

3. It ſpeaks only of breaking the houſe in the *night-time*, ſo that it ſeems it extends not to a breaking the houſe in the *day-time*, unleſs it be ſuch a breaking, as imports with it apparent robbery, or an intention, or attempt thereof.

4. Tho the ſtatute ſpeaks not of burning of houſes, yet he, that attempts the wilful burning of a houſe, and is kild in that attempt, is free from forfeiture without the aid of this ſtatute, as appears 26 *Aſſiz.* 23.

By the judicial law, *Exod.* xxii. 2, 3. *If a thief be found breaking up, and he be ſmitten that he die, no blood ſhall be ſhed for him, but if the ſun be riſen upon him, there ſhall blood be ſhed for him, for he ſhould make reſtitution, and if he have nothing, he ſhall be ſold for his theft:* and by the *Roman* law of the twelve tables, *Fur manifeſto furto deprehenſus, ſi aut, cum faceret furtum, nox eſſet, aut inter-diu ſe telo, cum deprehenderetur, defenderet, impune occideretur* (*f*): upon the latter of theſe laws the civilians and canoniſts have made many curious diſtinctions, *quas vide apud* Covarruviam, Tom. I. Par. 3. *de homicidio ad defenſionem commiſſo* (*g*); and upon the former

the

(*f*) *Dig. Lib* IV. *tit.* 2. *ad leg. Aquil. l.* 4. §. 1. *Agel. Lib.* XI. *cap.* 18.

vide ſupra cap. 1. *p.* 3 *&* 6.

(*g*) *p.* 561. *Edit. Antwerp* 1614.

the *Jewiſh* Rabbies have made the like, *quas vide apud* Selden *de jure gentium.*

But as the laws of ſeveral nations in relation to crimes and puniſhments differ, and yet may be excellently fitted to the exigencies and conveniencies of every ſeveral ſtate, ſo the laws of *England* are excellently fitted in this and moſt other matters to the conveniencies of the *Engliſh* government, and full of excellent reaſon, and therefore I ſhall not trouble myſelf about other laws than thoſe of *England.* (*b*)

IV. There remains yet one other particular, namely, the killing a malefactor, that doth not yield himſelf to juſtice upon purſuit.

If a perſon be indicted of felony and flies, or being arreſted by warrant or proceſs of law upon ſuch indictment eſcapes and flies, and will not render himſelf, whereupon the officer or miniſter cannot take him without killing of him, this is not felony, neither ſhall the killer forfeit his goods, or be driven to ſue forth his pardon, but upon his arraignment ſhall plead *not guilty,* and accordingly it ought to be found by the jury. 3 *E.* 3. *Coron.* 288.

But if he may be taken without ſuch ſeverity, it is at leaſt manſlaughter in him, that kills him, therefore the jury is to inquire, whether it were done of neceſſity or not. 22 *Aſſiſ.* 55. *Stamf. P. C. Lib.* I. *cap.* 5. *fol.* 13. *b.*

And the ſame law it is, if *A.* commits felony and flies, or reſiſts the people, that come to apprehend him, ſo that he cannot be taken without killing him, ſuch killing is not felony, nor does the perſon, that did it, forfeit any thing, tho *A.* were not indicted, nor the perſon, that did it, had any warrant of any court of juſtice, for in ſuch caſe the law makes every perſon an officer to apprehend a felon. 22 *E.* 3. *Coron.* 261.

And the ſame law it is, if he be taken, and in bringing to the gaol he breaks away, and the people of the vill purſue and cannot take him, unleſs they kill him, thoſe, that kill him, upon their arraignment ſhall be acquitted of the felony, but

(*b*) By the common law, *Qui latronem occiderit nocturnum vel diuturnum, non tenetur, ſi aliter periculum evadere poſſit, tenetur tamen, ſi poſſit. Bract. Lib.* III. *de corona, fol.* 135. *a. Vide LL. Withred. Edit. Wilk. p.* 12. *LL. Inæ, l.* 16, 20, 21, 35. *LL. Ethelſtani, l.* 11. *LL. Canuti, l.* 59.

yet the townſhip ſhall be amerced for the eſcape, and the perſon kild ſhall forfeit his goods upon the flight found. 3 *E.* 3. *Cor.* 328, 340. and by ſome it hath been held he ſhall forfeit the iſſues of his lands, till the year and day be paſt. 3 *E.* 3. *Coron.* 290.

If *A.* be ſuſpected by *B.* to commit a felony, but in truth he committed none, neither is indicted, yet upon the offer to arreſt him by *B.* he reſiſts or flies, whereby *B.* cannot take him without killing him, and *B.* kill him, if in truth there were no felony committed, or *B.* had not a probable cauſe to ſuſpect him, this killing is at leaſt manſlaughter, but if there were a felony committed, and *B.* hath cauſe to ſuſpect *A.* but in truth *A.* is not guilty of the fact, tho upon this account *B.* may juſtify the impriſonment of *A.* yet *quære*, if *B.* kill *A.* in the purſuit, whether this will excuſe him from manſlaughter.

But if a felony be committed, but not by *A.* but by ſome other, and *B.* hath a warrant from a juſtice of peace to apprehend *A.* or that a hue and cry comes to *B.* the conſtable of *D.* to apprehend *A.* who endeavours to eſcape, or ſtands in reſiſtance, ſo that he cannot be taken without killing him, it ſeems the killer is excuſed from felony, tho *A.* were not indicted; *vide pro hoc* 3 *E.* 3. *Coron.* 289: and the reaſon is, becauſe he is bound by law to execute his warrant, or purſue the party upon hue and cry and to apprehend him, and is indictable for a contempt if he doth not, and ſo it differs from the former caſe, for no man is bound to ſuſpect another, but it is the act of his own judgment, and ſo he is merely his own warrant, and he may not adventure ſo far as the death of a party, unleſs he be ſure he was the offender, tho he may impriſon him, for thereupon he ſhall be brought to his trial; *ſed de his vide Staunf. P. C. Lib.* I. *cap.* 5. *Crompt. fol.* 30.

And it is to be obſerved, that whether the party reſcues himſelf after he is taken, and fly or reſiſt, or whether he fly or reſiſt before his taking, and be kild in the purſuit, it is all one, the killer forfeits nothing, but the perſon kild forfeits his goods, tho he were kild before attainder, upon an inquiſi-

tion either by the coroner or petit jury finding his flight. 3 *E.* 3. *Coron.* 288, 328.

By the ſtatute of 21 *E.* 1. *de malefactoribus in parcis*, if a parker, foreſter, or warrener, find any treſpaſſers wandering in his park, foreſt, or warren, intending to do damage therein, and they will not yield to the foreſter after hue and cry made to ſtand to the king's peace, but fly or defend themſelves, whereupon they are kild, the parker, foreſter, warrener, or their aſſiſtants ſhall not loſe life or limb for the ſame, but ſhall enjoy the king's peace, ſo it be not done upon any former malice or evil will; but to make good ſuch juſtification by a parker, foreſter, or warrener, there are theſe things requiſite: 1. It muſt be a legal foreſt, park, or warren, or chace, (for a chaſe includes warren) and not a bare warren, park, *&c.* in reputation, for if a man incloſe a piece of ground, and put deer or conies in it, this makes it not a park or warren without a preſcription time out of mind, or the king's charter. 2. If a man have a park within a foreſt, where he may hunt, and the foreſter kill the purloin-man, or his ſervant hunting in the purloin, this doth not excuſe the foreſter from murder or manſlaughter, as the circumſtances of the caſe are. *Dyer* 327. *a.*

And note, that in all theſe caſes of homicide by neceſſity, as in purſuit of a felon, in killing him, that aſſaults to rob, or comes to burn or break a houſe, or the like, which are in themſelves no felony, the matter may be ſpecially preſented by the grand inqueſt, (*quod vide* 3 *E.* 3. *Coron.* 305, 289. and ſeveral other places,) or by the coroner's inqueſt, and thus it was done in *Holme's* caſe, 26 *Eliz. Crompt.* 28. and in the caſe of a ſervant of juſtice *Croke*, who coming with the judge out of the circuit was aſſaulted in the highway, and he kild the aſſailant, and the matter preſently ſpecially found by the coroner's inqueſt, whereby he was diſcharged by the ſtatute of 24 *H.* 8. *cap.* 5. and in theſe caſes upon this ſpecial preſentment the party ſhall be preſently diſcharged without being put to plead, but then this acquittal by preſentment is no final diſcharge, for he may be indicted and arraigned again afterwards, if the matter of the former indictment be

falſe;

falſe; but if in ſuch a caſe the preſentment of the grand inqueſt or coroner's inqueſt be ſimply of murder or manſlaughter, and thereupon he is arraigned and tried, and this ſpecial matter given in evidence, he ſhall be acquitted thereupon, for upon theſe ſpecial matters proved in evidence, he is not guilty, for it is no felony, and this acquittal is a perpetual diſcharge and bar againſt any other indictment for the ſame death; therefore this latter way is more advantageous in the concluſion for the party, than a ſpecial preſentment. *Cromp. fol.* 28. *Holme's* caſe.

CHAP. XLI.

Concerning the forfeiture *of him, that kills in his own defenſe, or* per infortunium.

IF a man kill another by misfortune, yet he ſhall forfeit his goods in ſtrictneſs of law, in reſpect of the great favour the law hath to the life of a man, and to the end that men ſhould uſe all care, diligence and circumſpection in all they do, that no ſuch hurt enſue by their actions.

But if the occiſion or killing can by no means be attributed to the act of the perſon, but to the act of him, that is kild, there it ſeems, tho the inſtrument of the death is forfeited as a deodand, there follows no forfeiture of the goods of the perſon: for inſtance,

If *A.* ſhoots at rovers, as he may lawfully do, if *B.* after the arrow deliverd runs into the place, where the arrow is to fall, of his own accord, and ſo is kild, this ſeems to be ſuch an *infortunium*, that affects not *A.* with the loſs of goods, for it was not his act, that contributed to the death of *B.* but the wilful or improvident act of *B.* himſelf; *quere.*

If *A.* aſſaults *B.* and *B.* in his own defenſe kills *A.* yet *B.* forfeits his goods.

If the coroner's inqueſt find the killing ſpecially *ſe defendendo*, yet the court ſhall arraign him, and try him, whether it were *ſe defendendo*, before he ſhall have his pardon of courſe. 4 *H.* 7. 1 & 2.

But if *B.* having a pitch-fork in his hand, *A.* aſſaults *B.* ſo fiercely, that he runs upon the pitch-fork of *B.* *B.* offering no thruſt at all againſt *A.* (tho this be a very difficult matter of fact to ſuppoſe, yet if the fact be ſuppoſed to be ſo) it ſeems *B.* forfeits no goods, becauſe it was the act of *A.* himſelf, and ſome have ſaid rather, that in that caſe *A.* is *felo de ſe*, and forfeits his goods, *de quo ſupra*, 44 *E.* 3. 44. *Coron.* 94. tho 3 *E.* 3. *Coron.* 286. ſaith his goods are forfeit in that caſe.

But where the killing of a man in his defenſe is in the law no felony, but the party upon his arraignment upon the ſpecial matter is to be found or judged ſimply not guilty, there is no forfeiture, but the party ought to be abſolutely acquitted, unleſs he fled, and it be found, that *fugam fecit*, for that is a diſtinct forfeiture, altho the party be not guilty of the fact, and therefore always the jury is charged to inquire, whether the priſoner be guilty or not guilty, and if not guilty, whether he fled for the ſame, and if he fled, then to inquire alſo of his goods and chattles.

And the caſes, where the priſoner is not to forfeit any goods or chattles, but is to be abſolutely acquitted, if he kill in his own defenſe, are before remembred, and I here recollect them.

1. He that kills a thief, that attempts to rob him.

2. He that kills a perſon, that attempts to rob or kill him in or near the highway, or in the manſion of the killer, by the ſtatute of 24 *H.* 8. *cap.* 5. and this, tho he hath not yet actually robbed. 3 *E.* 3. *Coron.* 330.

3. He that kills a perſon, that attempts wilfully to fire his houſe, or to commit burglary, tho he hath not actually broken or fired the houſe, 26 *Aſſiz.* 23. 29 *Aſſiz.* 23. if he came with that purpoſe.

4. An officer or bailiff, that in execution of his office kills a perſon, that aſſaults him, tho the officer gives not back to the wall, for the officer is under the protection of the law, and the books tell us it is not felony in ſuch caſe. *Co. P. C.* p. 65.

5. The ſame law is of a conſtable, that commands the king's peace in an affray, and is reſiſted.

6. He that kills a felon, that reſiſts, or *juſticiari ſe non permittit*, and the like of a conſtable or watchman, that is charged to take a perſon charged with felony, or attempts to take him upon hue and cry, if the perſon ſo charged reſiſt or fly, and cannot be otherwiſe taken, tho perchance he be innocent, for the reaſon before given, and this either before or after the arreſt.

7. If there be a great riot, or rebellious aſſembly, how far the killing of ſuch perſons in ſuppreſſing of them is criminal is to be ſeen.

By the ſtatute 1 *Mar. cap.* 12. "If any perſons to the "number of twelve or more ſhall intend, practiſe, or put "in ure to overthrow pales, hedges, ditches, or incloſures of "parks or other grounds, banks of fiſh-ponds, conduit-heads, "or pipes, or to pull down dove-cotes, barns, houſes, mills, "or burn ſtacks of corn, or abate rents or price of victual "or corn, and being required by the juſtices of peace, ſhe"riff of the county, mayors, bailiffs or head officers of ci"ties by proclamation in the queen's name to retire to their "homes, ſhall remain together one hour after ſuch procla"mation, or ſhall put in ure ſuch things, they ſhall be ad"judged felons.

"And if any perſons above the number of two ſhall unlawfully aſſemble to put in ure the things aforeſaid, that "it ſhall be lawful for the ſheriff, juſtices of peace, mayors, "bailiffs, and every other perſon having commiſſion from "the queen to raiſe force in manner of war to be arrayed to "ſuppreſs and apprehend the rioters, and if the perſons ſo "unlawfully aſſembled after command and requeſt by pro"clamation ſhall continue together, and not return to their "habitations, and if any of them happen to be kild, maimed

" or hurt in or about the ſuppreſſing or taking them, " the ſheriff, juſtice, mayor, *&c.* and their aſſiſtants, ſhall " be diſcharged and unpuniſhable for the ſame againſt the " queen and all other:" this act was continued by the ſtatute of 1 *Eliz. cap.* 16. during her life. (*a*)

And it ſeems, as to this manner of killing rioters, that reſiſt the miniſters of juſtice in their apprehending, it is no other but what the common law allows, or at leaſt what the ſtatute of 13 *H.* 4. *cap.* 7. implicitly allows to two juſtices of the peace with the ſheriff or under-ſheriff of the county by giving them power to raiſe the *poſſe comitatus*, if need be, and to arreſt the rioters, and they are under a penalty of 100 *l.* if they neglect their duty herein.

And with this agrees Mr. *Dalton*, *cap.* 46. *p.* 115. (*b*), *cap.* 98. *p.* 249. (*c*), and *Crompt. de Pace* 62. *b.* " Nota, que viſ- " count & juſtices de peace point prendre tants des homes " in harneys, quant ſont neceſſary & guns &c. & tuer les " rioters, ſils ne voilent eux rendre, come fuit pris in caſe " de *Drayton Baſſet*, car le ſtatute 13 *H.* 4. *cap.* 7. parle, quils " eux arreſtent, & ſi les juſtices ou aſcuns de leur company " tue aſcun des rioters, qe ne voil render neſt offence in lui, " come fuit auxi priſe in le dit caſe de *Drayton Baſſet* (*d*);" and *note*, that tho the ſtatute of 1 *Eliz.* was then in force, yet that was not a caſe within that ſtatute, nor depending on it.

And it ſeems the ſame law is for the conſtable of a vill in caſe a riot happen within a vill, he may aſſemble force within his vill to arreſt the rioters, and if he or thoſe aſſembled in his aſſiſtance come to arreſt the rioters, and they reſiſt, and be kild by the conſtable or any of his aſſiſtants, the conſtable and his aſſiſtants are diſpuniſhable for the ſame, for he is enabled hereunto by the common law, as being an officer for the preſervation of the peace, and may command perſons to his aſſiſtance, and if they refuſe, they are fineable for it.

And

(*a*) 1 *Geo. cap.* 5. a new act was made to the ſame purport, which is perpetual.

(*b*) *New Edit. cap.* 182. *p.* 297.
(*c*) *cap.* 150. *p.* 481.
(*d*) See alſo *Crompt.* 23. *b.*

And farther, the ſtatute of 17 *R.* 2. *cap.* 8. commands and authorizes the king's miniſters to uſe all their power to take and ſuppreſs ſuch riots and rioters, and a conſtable is the king's miniſter; and the ſtatute of 13 *H.* 4. *cap.* 7. is no repeal of this ſtatute, ſo that the killing of a rioter by a ſheriff, juſtice of peace, or conſtable, when he will reſiſt and not ſubmit to the arreſt, ſeems to be no felony at common law, nor makes any forfeiture, for they do but their office, and are puniſhable, if they neglect it.

8. If the priſoners in gaol aſſault the gaoler, and he in his defenſe kill any of them, this is no felony; nor makes any forfeiture. 22 *Aſſiz.* 5. *per Thorp, adjudge per tout le councel.*

CHAP. XLII.

Concerning the taking away of the life of man by the courſe of law, *or* in execution of juſtice.

THIS kind of occiſion of a man according to the laws of the kingdom and in execution thereof ought not to be numbred in the rank of crimes, for it is the execution of juſtice, without which there were no living, and murders, burglaries, and all capital crimes would be as frequent and common, as petit treſpaſſes and batteries.

The taking away of the life therefore of a malefactor according to law by ſentence of the judge, and by the ſheriff or other miniſter of juſtice purſuant to ſuch ſentence, is not only an act of neceſſity, but of duty, not only excuſable, but commendable, where the law requires it.

But becauſe there are ſome cautions and conſiderations in this matter, I have added it to the cloſe of this title of homicide.

Regularly it is not lawful for any man to take away the life of another, tho a great malefactor, without evident neceſſity, whereof before, or without due proceſs of law, for the deliberate uncompelled extrajudicial killing of a perſon attaint of treaſon, felony, or murder, or in a *præmunire*, tho upon the ſcore of their being ſuch, is murder. (*a*)

Therefore it is neceſſary, 1. That he, that gives ſentence of death againſt a malefactor, be authorized by lawful commiſſion or charter, or by preſcription to have cognizance of the cauſe. 2. That he that executes ſuch ſentence be authorized to make ſuch execution, otherwiſe it will be murder or manſlaughter, or at leaſt a great miſpriſion in the judge that ſentenceth, or in the miniſter that executeth.

I. As touching the authority of the judge, I ſhall not at large diſcourſe the juriſdiction of the judges or courts in this place; it will be more proper hereafter, but ſhall mention only ſome things, that may be ſeaſonable for this place.

If he, that gives judgment of death againſt a perſon, hath no commiſſion at all, if ſentence of death be commanded to be executed by ſuch perſon, and it is executed accordingly, it is murder in him, that commands it to be executed, for it was *coram non judice.*

If a commiſſion of the peace iſſue, this extends not to treaſon, neither can juſtices of peace hear and determine all treaſons by force of this commiſſion, for it extends only to felonies, (tho ſome treaſons are by act of parliament limited to their cognizance, as hath been before obſerved) if they take an indictment of treaſon, and try and give judgment upon the party, this is moſt certainly erroneous, and poſſibly avoidable by plea, but I do not think it makes the juſtices guilty of murder in commanding the execution of ſuch ſentence, for they were not without ſome colour of proceeding therein, becauſe all treaſon is felony, tho it be more, and the king may, if he pleaſe, proceed againſt a traitor for felony,

(*a*) *Coron.* 203.

lony, and antiently a pardon of all felonies diſcharged ſome treaſons. 1 *E.* 3. *Charter de Pardon* 13. 22 *Aſſiz.* 49. *Co. P. C. p.* 15. but it is a great miſpriſion in ſuch juſtices.

The juſtices of the common pleas cannot hold plea upon an indictment or appeal in capital cauſes, it will be at leaſt erroneous, if not voidable by plea, but if they hold plea in appeal of death by writ, and give judgment therein for the party to be hanged, which is executed accordingly, I think it is an error, and a great miſpriſion in them, but not felony, becauſe they had colour to hold plea thereof by an original writ out of the chancery under the great ſeal.

Upon the ſame reaſon I take it, that if there be a writ ſent to the ſheriff, eſchetor, or *A. B.* and *C.* to hear and determine felonies, whereas it ought to be a commiſſion, 42 *Aſſiz.* 12, 13. and they proceed thereupon to a judgment and execution in caſe of felony, it is a great miſpriſion, but I think it makes not the judge nor executioner guilty of murder; the ſame law I take to be in *Lacie*'s caſe, *quod vide Co. P. C. p.* 48. 5 *Co. Rep.* 106. *a. Conſtable*'s caſe. The commiſſioners upon the ſtatute of 28 *H.* 8. had given judgment of death againſt him, that ſtruck at ſea, and the party died at land; and the ſame law I take to be, where he, that hath the franchiſe of *Infangthief*, gives judgment of death againſt a felon not within his juriſdiction, 2 *R.* 3. 10. *b.* the caſe of the abbot of *Crowland*; it might be a cauſe of ſeizure of the liberty, but makes not the ſteward guilty of murder.

And what I have ſaid of a proceeding in capitals without the ſtrict extent of their commiſſion may be ſaid of the like proceeding, where in ſtrictneſs of law the commiſſion happens to be determined.

A commiſſion of gaol-delivery iſſues to *A. B. &c.* they ſit one day, and forget to adjourn their commiſſion, or the clerk forgets to enter the adjournment, a felony is committed the next day, and they proceed in ſeſſions, and take an indictment, and give judgment of death againſt the malefactor, this judgment is erroneous, and the clerk of aſſizes ſhall never be permitted to amend the record, and enter an adjournment, this judgment is erroneous, and ſhall be reverſed, but

it makes not the judges guilty of murder or homicide, tho in ſtrictneſs of law their commiſſion was determined by the firſt day's ſeſſion without adjournment.

King *James* iſſued out ſeveral commiſſions of gaol-delivery, *&c.* the juſtices went their circuit, the king died, yet they proceeded, and before notice of the king's death condemned and executed many priſoners; it is held theſe proceedings were good, and the commiſſions ſtood till notice of the king's death, *M. 3 Car. C. B.* Sir *Randolph Crew*'s caſe (*b*), tho in ſtrictneſs of law their commiſſions were determined by the king's death; but ſuppoſe they were both in law and fact determined, the judgments, that happend upon ſeſſions begun after the king's death, would be erroneous, but the judges had not been criminal in commanding the execution of their ſenſence before notice, for if *ignorantia juris* doth in ſome caſes excuſe a judge, much more doth *ignorantia facti.*

If a commiſſion of gaol-delivery iſſue to *A. B.* and *C.* in the county of *D.* and afterward a ſecond commiſſion of gaol-delivery in the ſame county iſſue to *E. F.* and *G.* and there is notice given to the former commiſſioners, but no ſeſſion by virtue of the ſecond commiſſion, whereupon the former proceed notwithſtanding that notice *in pays*, (as conceiving it inſufficient, unleſs either a writ of *Superſedeas* had been ſent them, or at leaſt a ſeſſion by the ſecond commiſſion) and they proceed in caſes capital, this makes them not guilty of felony, 34 *Aſſiz.* 8. becauſe tho the ſecond commiſſion be effectual for them to proceed without any actual revocation by *Superſedeas*, or otherwiſe of the former, yet the former is not actually determined, till a *Superſedeas* or a ſeſſion by virtue of the ſecond commiſſion, upon an extrajudicial notice, or a notice *in pays*, the firſt commiſſioners may, if they pleaſe, forbear any further ſeſſion, but they are not bound to take notice of rumours and reports; the like in caſe of a ſheriff, *M. 26 Eliz. Moore* 333. 5 *E.* 4.

If in the time of peace a commiſſion iſſue to exerciſe martial law, and ſuch commiſſioners condemn any of the king's ſubjects (not being liſted under the military power) this is without

(*b*) *Cro. Car.* 98.

without all queſtion a great miſpriſion, and an erroneous proceeding, and accordingly adjudged in parliament in the caſe of the earl of *Lancaſter*, *Parl.* 1 *E.* 3. *part* 1. *de quo ſupra p.* 344.

And in that caſe the exerciſe of martial law in point of death in time of peace is declared murder. *Co. P. C. p.* 52.

But ſuppoſe they be liſted under a general or lieutenant of the king's appointment under the great ſeal, and modelled into the form and diſcipline of an army, either in garriſon or without, yet as long as it is *tempus pacis* in this kingdom, they cannot be proceeded againſt as to loſs of life by martial law; and the ſame for mariners, that are within the body of the kingdom, but their miſdemeanors, at leaſt if capital, are to be puniſhed according to the ſettled laws of the kingdom, 3 *Car. cap.* 1. the petition of right; yea, and it ſeems as to mariners and ſoldiers at ſea, when in actual ſervice in the king's ſhips, they ought not to be put to death by martial law, unleſs it be actually in time of hoſtility; and this appears by the ſtatute of 28 *H.* 8. that ſettled a commiſſion to proceed criminally in caſes of treaſon and felony, and by the late act of 13 *Car.* 2. *cap.* 9. ſettling ſpecial orders under pain of death by act of parliament (*c*); but indeed, for crimes committed upon the high ſea, the admiral had at common law a juriſdiction even unto death *ſecundum leges maritimas*, but this was a different thing from martial law.

H. H. C. L. c. 2. *p.* 36. And this appears alſo by the ſtatute of 13 *R.* 2. *cap.* 2. the conſtable and marſhal, who are the *judices ordinarii* in caſes belonging to the martial law, are yet thereby declared to have no juriſdiction within the realm, but of things that touch war, which cannot be diſcuſſed nor determined by the common law.

It muſt therefore be a time of war, that muſt give exerciſe to their juriſdictions, at leaſt in caſes of life.

And thus far concerning the judicial ſentence of death, where and when it is homicide criminally, and when not.

II. Now a few words concerning the officer executing ſuch ſentence, and where and when he is culpable in ſo doing.

I Where-

(*c*) And this appears alſo from the deſertion, 3 *Geo.* 1. *cap.* 2. & *multos* annual ſtatutes for puniſhing mutiny or *alios*.

Whereſoever the judge hath juriſdiction of the cauſe, the officer executing his ſentence is not culpable, tho the judge err in his judgment, but if the judge have no manner of juriſdiction in the cauſe, the officer is not altogether excuſable, if he execute the ſentence.

In the great courts of juſtice, as of *oyer* and *terminer*, gaol-delivery; and of the peace regularly the ſheriff of the county, or thoſe that he ſubſtitutes as under-ſheriff, gaoler, or executioner, are the ordinary miniſters in execution of malefactors, and they are to purſue the ſentence of the court, and therefore, 1. If he vary from the judgment, as where the judgment is to be hanged, if he behead the party, it is held murder (*d*). 2. It muſt be done by the proper officer, *viz.* the ſheriff or his ſubſtitute, if another doth it of his own head, it is held murder: *vide Co. P. C. p.* 52. *Kelyng. Cro: Law. 267*

The uſe heretofore was, and regularly ſhould be ſo ſtill, that if ſentence of death be given by the lord high ſteward, a warrant under the ſeal of the lord ſteward, and in his name ſhould iſſue for the execution; and the like by three at leaſt of the commiſſioners of *oyer* and *terminer*, where ſentence of death is given by them. *Co. P. C. p.* 31.

But uſe hath obtaind otherwiſe before commiſſioners of gaol-delivery, for there is no warrant under the ſeal of the juſtices for execution, but only a brief abſtract or calendar left with the ſheriff or gaoler, and I remember Mr. juſtice *Rolle* would never ſubſcribe a calendar, but after judgment given would command the ſheriff in court to do execution, and for not doing it, he fined *Varney* the ſheriff of *Warwickſhire* 2000 *l.*

(*d*) Of this opinion was alſo lord *Coke*, *Co. P. C. p.* 52, 211. notwithſtanding it had been practiſed otherwiſe in ſome inſtances, as in the caſe of queen *Anne Boleyn*, and queen *Katherine Howard*, in the time of *Henry* VIII. the duke of *Somerſet* in the time of *Edward* VI. and the lord *Audley* in the time of *Charles* I. upon the authority of which caſes the lady *Alice Liſle* was beheaded for treaſon 1 *Jac.* II. See *State Tr. Vol.* IV. *p.* 129.

So in the caſes of *Afton*, 19 *Jan.* 1690. at the *Old-Baily*, (*State Tr. Vol.* IV. *p.* 483.) and *Matthews* the printer, *Octob.* 30, 1719. at the *Old-Baily*, who were both ſentenced for high treaſon, and were hanged till they were dead, without any quartering or beheading, altho this was not only different from, but contrary to the ſentence in high treaſon, which orders, that they ſhall be hanged, but not till they are dead: but as lord *Coke* ſays in the place abovementiond, *Judicandum eſt legibus non exemplis*, and indeed, ſince the judgment is the warrant for the execution, it ſhould ſeem that every execution, which is not purſuant to the judgment, is unwarrantable. *See Kelyng's Cro: Law. 267.*

If a prisoner be removed into the king's bench by *Habeas Corpus*, or taken upon an indictment of felony in *Middlesex*, and be committed to the marshal, and upon his arraignment be found guilty, and hath judgment to die, the court may send the person to *Newgate*, and command the sheriff of *Middlesex* to do execution, but if he be remitted to the marshal, (as regularly he ought to be,) then the marshal is the proper officer of the court to do execution, and he may execute the offender in *Middlesex*, where-ever the offense was committed (e), and the court may *ore tenus*, or by their order, command the sheriff of *Middlesex* to be assisting, but the entry upon the roll ought to be, *Et præceptum est mareschallo, &c. quod faciat executionem periculo incumbente*; and thus it was done *H.* 24 *Car.* 2. upon a conviction of murder committed in *Kent* upon a trial at the king's bench bar, upon search and producing of many antient and late precedents, for regularly he, that is the immediate minister of the court, ought to make execution, and such is the marshal to the court of king's bench, especially where the persons are committed to his custody, and this is done without any writ, but only by the command of the court *ore tenus*.

And thus far concerning the death or killing of a man, where it is not, and where it is punishable, and the several degrees thereof.

CHAP.

4

(e) See *Abbot*'s case *supra in notis* p. 464. who were executed in *Surrey* for a fact committed in *Pembrokeshire* in *Wales*: see also the case of *Fitz-Patrick* and *Broadway*, *State Tr. Vol.* I. p. 374. who were executed in *Middlesex* for a fact in *Wiltshire*, and the case of *Layer*, *State Tr. Vol.* VI. p. 332. who was executed in *Middlesex* for a fact in *Essex*.

CHAP. XLIII.

Of larciny, *and its kinds.*

ALtho the offenſes of burglary and arſon are of an higher nature, than larciny, yet becauſe there be ſome things, that fall under the conſideration of larciny, that are neceſſary to be known previouſly to the conſideration of burglary, *&c.* I ſhall begin with this.

Larciny or theft under the various laws of ſeveral countries hath been under various degrees of puniſhment: in ſome countries the puniſhment was triple or fourfold reſtitution, as among the *Jews* (*a*), in others deportation or baniſhment, or condemning to ſeveral employments, as among the *Romans.* (*b*).

And in *England* in antient time the puniſhment of theft was not fixed or ſettled, and altho *Hoveden* and *Simon Dunelmenſis* tell us, that *firmiſſimâ lege ſtatuit* Henricus *primus, quod fures latrocinio deprehenſi ſuſpendantur*, yet in the time of *Henry* II. they were otherwiſe puniſhed; *quod vide apud Seldon Jur. Ang. p.* 83. But the ſame law touching the puniſhment of grand larciny with death ſeems to have been fixed and ſettled ever ſince the time of *Henry* II. and *Bracton*, that wrote in the time of *Henry* III. takes it as a thing ſettled and commonly practiſed in his time; *vide ipſum Lib.* III. *cap.* 32. *p.* 151. *b.* (*)

Now touching the kinds of larcinies they are two, *viz.* either ſimple larciny, or larciny accompanied with violence or putting in fear, which is called robbery.

Simple larciny or theft is of two kinds, *viz.*

Grand larciny, when it is above the value of twelve-pence.

Petit larciny, when only of the value of twelve-pence or under.

The nature of the offenſe is the ſame in both, but the degrees of their puniſhment differ, as ſhall be ſaid.

And

(*a*) *Vide ſupra p.* 9. (*b*) *Vide ſupra p.* 11. (*) *Vide ſupra p.* 12. & [illegible] *ibidem.*

And therefore what is ſaid concerning grand larciny here is applicable to petit larciny, except as to the point of puniſhment, for the puniſhment of grand larciny is death and loſs of goods, the puniſhment of petit larciny is loſs of goods and whipping, but not death.

Simple larciny is defined by *Bracton* (*c*) and *Britton* (*d*) to be *fraudulenta contrectatio rei aliene cum animo furandi invito domino, cujus res illa fuerit:* by my lord *Coke* to be the felonious and fraudulent taking and carrying away by any man or woman of the mere perſonal goods of another, neither from the perſon, nor by night, in the houſe of the owner. *Co. P. C. p.* 107.

I ſhall purſue his method in that chapter with ſuch additions as ſhall be requiſite.

The indictment runs *vi & armis felonicè furatus fuit, cepit & aſportavit* in caſe of dead chattles, *cepit & abduxit* in caſe of a horſe, *cepit & effugavit* in caſe of ſheep, cows, *&c.* wherein the words *felonicè furatus fuit, cepit,* are eſſential to the crime.

This deſcription gives us theſe heads of inquiry.

1. What a taking. 2. What a carrying away. 3. What a felonious taking and carrying away. 4. What the perſonal goods. 5. What the goods of another. 6. What or who may be ſaid a taker.

Theſe regularly are the ingredients into this crime of felony, and muſt be ſeverally conſidered.

I. What ſhall be ſaid a taking.

If *A.* delivers a horſe to *B.* to ride to *D.* and return, and he rides away *animo furandi*, this is no felony; the like of other goods (*e*). *Co. P. C. p.* 107. 28 *Eliz. Butler's* caſe.

So if a man deliver goods to a carrier to carry to *Dover*, he carries them away, it is no felony; but if the carrier have a bale or trunk with goods deliverd to him, and he break the bale

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(*c*) *Lib.* III. *de corona, cap.* 32. *fol.* 150. *b.*

(*d*) *cap.* 15. *p.* 22. See alſo *Fleta, Lib.* I. *cap.* 38. *p.* 54.

(*e*) Upon this principle it was doubted, whether a perſon hiring lodgings was guilty of felony in ſtealing the goods he had hired with his lodgings. See *Kel.* 24 & 81. but this doubt is removed by 3 & 4 *W. & M. cap.* 9. whereby it is declared to be felony.

bale or trunk, and take and carry away the goods *animo furandi*, or if he carry the whole pack to the place appointed, and then carry it away *animo furandi*, this is a felonious taking by the book of 13 E. 4. 9. *Co. P. C. p.* 107.

But that muſt be intended, when he carries them to the place, and delivers or lays them down, for then his poſſeſſion by the firſt delivery is determined, and the taking afterwards is a new taking: *vide* 21 *H.* 7. 14.

Before the ſtatute of 21 *H.* 8. *cap.* 7. if a man had deliverd goods to his ſervant to keep or carry for him, and he carrieth them away *animo furandi*, this had not been felony (*f*), but by that ſtatute it is made felony, if of the value of forty ſhillings; but the offender ſhall at this day have his clergy (*g*); but yet if an apprentice (*b*) doth this, or if a man deliver a bond to his ſervant to receive money, or deliver him goods to ſell, and he accordingly ſells and receives the money, and carries it away *animo furandi*, this is neither felony at common law, nor by this ſtatute. *Co. P. C. p.* 105. 26 *H.* 8. *Dy.* 5. *a. b.*

A. a ſervant of *B.* receives the rents of *B.* and *animo furandi* carries it away, this is not felony at common law, becauſe *A.* had it by delivery, nor by the ſtatute, becauſe he had it not by the delivery of his maſter or miſtreſs. *Dalt. cap.* 102. (*i*)

A. delivers the key of his chamber to *B.* who unlocks the chamber, and takes the goods of *A. animo furandi*, this is felony, becauſe the goods were not deliverd to him, but taken by him. 13 E. 4. 9. *b.*

(*f*) This was a diſputed point (ſee 3 *H.* 7. 12. *b.*) for which reaſon the ſtatute of 21 *H.* 8. *cap.* 7. was made to ſettle the doubt, that was at common law, for in the before-mentiond caſe, 21 *H.* 7. 14. it is ſaid to be felony, if he was intruſted with the keeping only within the houſe, ſtable, &c. becauſe then the things are adjudged in the maſter's poſſeſſion; but if he be intruſted to carry the things out of the houſe, &c. elſewhere, then it is not felony.

(*g*) By 27 *H.* 8. *cap.* 17. Clergy was taken away, reſtored again by 1 *E.* 6. *cap.* 12. and again taken away by 12 *Ann. cap.* 7. from offenſes committed in any dwelling-houſe or out-houſe, excepting in the caſe of apprentices under the age of fifteen years.

(*b*) The ſtatute alſo excepts all ſervants within the age of eighteen years, this act which was repeald by the general words of 1 *Mar. cap.* 1. is revived by 5 *Eliz. cap.* 10.

(*i*) *New Edit. cap.* 155. *p.* 496.

He, that hath the care of another's goods, hath not the poſſeſſion of them, and therefore may by his felonious embezzling of them be guilty of felony, as the butler, that hath the charge of the maſter's plate, the ſhepherd, that hath the charge of his maſter's ſheep. 3 *H.* 7. 12. *b.* 21 *H.* 7. 15. *a.* *Co. P. C. p.* 108.

The like law for him, that takes a piece of plate ſet before him to drink in a tavern, *&c.* for he hath only a liberty to uſe, not a poſſeſſion by delivery. 13 *E.* 4. 9.

And ſo it is of an apprentice, that felonioufly embezzels his maſter's goods or money out of his ſhop, it is felony. *Dalt. cap.* 102.

If *A.* comes to *B.* and by a falſe meſſage or token receives money of him, and carries it away, it is no felony, but a cheat puniſhable by indictment at common law, or upon the ſtatute of 33 *H.* 8. *cap.* 1. by ſetting in the pillory.

If *A.* find the purſe of *B.* in the highway, and take it and carry it away, and hath all the circumſtances, that may prove it to be done *animo furandi*, as denying it or ſecreting it, yet it is not felony; the like in caſe of taking of a wreck or *treaſure-trove.* 22 *Aſſiz.* 99. or a waif or ſtray.

But yet this taking of *treaſure-trove*, waif, or ſtray muſt be where the party, that takes them, really believes them to be ſuch, and colours not a felonious taking under ſuch a pretenſe, for then every felon would cover his felony with that pretenſe.

Where a man's goods are in ſuch a place, where ordinarily they are or may be lawfully placed, and a perſon takes them *animo furandi*, it is felony, and the pretenſe of finding muſt not excuſe.

If a man's horſe be going in his ground, or upon his common, and he takes it *animo furandi*, it is no finding, but a felony.

So it is if the horſe ſtray into a neighbour's ground or common, it is felony in him, that ſo takes him, but if the owner of the ground take it *damage-feaſant*, or the lord ſeiſe it, as a ſtray, tho perchance he hath no title ſo to do, this is not *felleo animo*, and therefore cannot be felony.

If

If the ſheep of *A.* ſtray from the flock of *A.* into the flock of *B.* and *B.* drives them along with his flock, or by pure miſtake ſhears him, this is not a felony, but if he know it to be another's, and marks it with his mark, this is an evidence of a felony.

A man hides a purſe of money in his corn-mow, his ſervant finding it took part of it, if by circumſtances it can appear he knew his maſter laid it there, it is felony; but then the circumſtances muſt be pregnant, otherwiſe it may be reaſonably interpreted to be a bare finding, becauſe an unuſual place for ſuch a *depoſitum*.

A. hath a deſign to ſteal the horſe of *B.* enters a plaint of replevin in the ſheriff's court for the horſe, and gets him deliverd to him, and then rides him away, this is taking and ſtealing, becauſe done *in fraudem legis* (*k*). *P.* 15 *Eliz. B. R. Co. P. C. p.* 108.

A. hath a mind to get the goods of *B.* into his poſſeſſion, privately delivers an ejectment, and obtains judgment againſt a caſual ejector, and thereby gets poſſeſſion, and takes the goods, if it were *animo furandi*, it is larciny.

If *A.* ſteal the horſe of *B.* and afterwards deliver it to *C.* who was no party to the firſt ſtealing, and *C.* rides away with it *animo furandi*, yet *C.* is no felon to *B.* becauſe tho the horſe was ſtolen from *B.* yet it was ſtole by *A.* and not by *C.* for *C. non cepit*, neither is he a felon to *A.* for he had it by his delivery.

But if *A.* ſteal the horſe of *B.* and after *C.* ſteal the ſame horſe from *A.* in this caſe *C.* is a felon both as to *A.* and as to *B.* for by the theft by *A. B.* loſt not the property, nor in law the poſſeſſion of his horſe or other goods, and therefore in that caſe *C.* may be appeald of felony by *B.* or indicted of felony, *quod cepit & aſportavit* the horſe of *B.* 4 *H.* 7. 5. *b.* 13 *E.* 4. 3. *b.*

And that is the reaſon, that if *A.* ſteal the goods of *B.* in the county of *C.* and carry them into the county of *D.* *A.* may be indicted for larciny in the county of *D.* for the continuance of the aſportation is a new caption, but if he be indicted

(*k*) See alſo *Kel.* 42.

indicted of robbery, it muſt be in the county of *C.* where the force and putting in fear was, *de quo poſtea.* 4 *H.* 7. 5. *b.*

II. The words of the indictment are not only *cepit*, but *cepit & aſportavit*, or *abduxit* or *effugavit.*

If *A.* come into the cloſe of *B.* and take his horſe with an intent to ſteal him, and before he gets out of the cloſe is apprehended, this is a felonious taking and carrying away, and is larciny. *Co. P. C. p.* 108, 109. Juſtice *Daliſon*'s reports.

So if a gueſt lodge in an inn, and takes the ſheets of the bed with an intent to ſteal them, and carries them out of his chamber into the hall, and going into the ſtable to fetch his horſe is apprehended, this is felony, and a felonious taking and carrying away, 27 *Aſſiz.* 39. *Co. P. C. p.* 108. and accordingly it was ruled 16 *Car.* 2. *B. R.* upon a ſpecial verdict found in *Cambridgeſhire* (*l*), *A.* comes into the dwelling-houſe of *B.* nobody being there, and breaks open a cheſt and takes out goods to the value of five ſhillings, and lays them on the floor of the ſame room, and is apprehended before he can remove them, he was indicted upon the ſtatute, and ouſted of his clergy by the advice of all the judges, except one, for the taking out of the cheſt was felony by the common law, and the ſtatute of 39 *Eliz. cap.* 15. alters not the felony, but ouſts only the clergy. *Ex libro Bridgeman.*

L. Kyl. C. L. 108, 9.

A. hath his keys tied to the ſtrings of his purſe, *B.* a cut-purſe takes his purſe with money in it out of his pocket, but the keys, which were hanged to his purſe-ſtrings, hanged in his pocket, *A.* takes *B.* with his purſe in his hand, but the ſtring hanged to his pocket by the keys, it was ruled this was no felony, for the keys and purſe-ſtrings hanged in the pocket of *A.* whereby *A.* had ſtill in law the poſſeſſion of his purſe, ſo that *licet cepit non aſportavit*, 40 *Eliz. Wilkinſon*'s caſe cited *M.* 8 *Jac. C. B.* (*m*)

III. As it is *cepit* and *aſportavit*, ſo it muſt be *felonicè* or *animo furandi*, otherwiſe it is not felony, for it is the mind, that makes the taking of another's goods to be a felony, or a bare treſpaſs only, but becauſe the intention and mind are ſecret, the intention muſt be judged by the circumſtances of the

3 fact,

(*l*) *Simſon*'s caſe, *Kel.* 31. (*m*) See *Crompt.* Juſtice 35. *a.*

fact, and tho theſe circumſtances are various, and may ſometimes deceive, yet regularly and ordinarily theſe circumſtances following direct in this caſe.

If *A.* thinking he hath a title to the horſe of *B.* ſeiſeth it as his own, or ſuppoſing that *B.* holds of him diſtrains the horſe of *B.* without cauſe, this regularly makes it no felony, but a treſpaſs, becauſe there is a pretenſe of title, but yet this may be but a trick to colour a felony, and the ordinary diſcovery of a felonious intent is, if the party doth it ſecretly, or being charged with the goods denies it.

If *A.* takes away the goods of *B.* openly before him or other perſons, (otherwiſe than by apparent robbery) this carries with it an evidence only of a treſpaſs, becauſe done openly in the preſence of the owner, or of other perſons, that are known to the owner.

If *A.* leaves his harrow or his plow-ſtrings in the field, and *B.* having land in the ſame field uſeth it, and having done either returneth them to the place, where they were, or acquaints *B.* with it, this is no felony, but at moſt a treſpaſs.

If *A.* and *B.* being neighbours, and *A.* having an horſe on the common, and *B.* having cattle there, that he cannot readily find, takes up the horſe of *A.* and rides about to find his cattle, and having done turns off the horſe again in the common, this is no felony, but at moſt a treſpaſs.

So if my ſervant without my privity take my horſe, and ride abroad ten or twelve miles about his own occaſions, and return again, it is no felony, but if in his journey he ſell my horſe, as his own, this is declarative of his firſt taking to be felonious, and *animo furandi.*

But in caſes of larciny the variety of circumſtances is ſo great, and the complications thereof ſo mingled, that it is impoſſible to preſcribe all the circumſtances evidencing a felonious intent, or the contrary, but the ſame muſt be left to the due and attentive conſideration of the judge and jury, wherein the beſt rule is *in dubiis* rather to incline to acquittal than conviction.

IV. It muſt be of goods perſonal, for otherwiſe no felony can be committed by taking them.

1. Therefore of chattles real no felony can be committed, and therefore the taking away of a ward cannot be felony, nor of a box or cheſt of charters, that concern land. 10 *E.* 4. 14. *b.* (*n*)

2. Neither can larciny be committed of things, that adhere to the freehold, as trees, graſs, buſhes, hedges, ſtones or lead of a houſe, or the like. (*o*)

But if they are ſevered from the freehold, as wood cut, graſs in cocks, ſtones digged out of a quarry, then felony may be committed by ſtealing of them, for they are perſonal goods. 18 *H.* 8. 2. *b.* 12 *E.* 3. *Coron.* 119.

But if a man come to ſteal trees, or the lead of a church or houſe, and ſever it, and after about an hour's time, or ſo, come and fetch it away, this hath been held felony, becauſe the act is not continuated but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and ſo it was agreed by the court of king's bench 9 *Car.* 1. upon an indictment for ſtealing the lead of *Weſtminſter-Abbey*. *Dalt. cap.* 103. *p.* 166. (*p*)

3. Neither of corn ſtanding upon the ground, for tho it be a chattel perſonal, and goes to the executor, yet it ſavours of the realty, while it ſtands ſo. *Co. P. C. p.* 109.

4. Larciny cannot be committed of ſuch things, whereof no man hath any determinate property, tho the things themſelves are capable of property, as of *treaſure trove*, or wreck till ſeized, tho he, that hath them in point of franchiſe, may have a ſpecial action againſt him, that takes them.

5. Larciny cannot be committed of things, that are *feræ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies, tho

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(*n*) Nor can felony be committed of bonds, notes, or other writings, that are ſecurities for a debt, becauſe they derive their value from *choſes en action*, which cannot be ſtolen. *Dalt. New Edit. p.* 501. 8 *Co. Rep.* 33. but by a late ſtatute 2 *Geo.* II. *cap.* 25. the ſtealing of bonds, bills, notes, &c. is made felony with or without the benefit of the clergy in the ſame manner, as if the offender had ſtolen goods of the like value, with the money ſecured by ſuch bonds, &c.

(*o*) But now by 4 *Geo.* II. *cap.* 32. it is felony to ſteal, rip, cut, or break with intent to ſteal any lead, iron bar, iron gate, iron rail or paliſado fixed to any houſe, or out-houſe, or fences thereunto belonging, and every perſon, who ſhall be aiding or abetting, or ſhall buy or receive any ſuch lead, &c. knowing the ſame to be ſtolen, is ſubjected to the ſame puniſhment.

(*p*) *New Edit. cap.* 156. *p.* 501.

tho in a park or warren, fiſh in a river or pond, wild-fowl, wild ſwans, pheaſants.

But if any of theſe are kild, larciny may be committed of their fleſh or skins, becauſe now they are under propriety.

Of domeſtic cattle, as ſheep, oxen, horſes, *&c.* or of domeſtic fowls, as hens, ducks, geeſe, *&c.* and of their eggs, larciny may be committed, for they are under propriety, and ſerve for food.

Of thoſe beaſts or birds, that are *feræ naturæ*, but reclaimed and made tame or domeſtic, and ſerve for food, larciny may be committed, as deer, conies, pheaſants, partridges, but then it muſt be, when he, that ſteals them, knows them to be tame, and ſo of reclaimed hawks, and likewiſe of the young of ſuch larciny may be committed, but of the young of thoſe beaſts or birds, that are *feræ naturæ*, tho in a park, and tho the owner hath a kind of property *ratione loci, privilegii & impotentiæ*, yet larciny cannot be committed of them, as of young fawns in a park, young conies in a warren: of young pigeons in a dove-coat, fiſh in a trunk or net, larciny may be committed.

Of young hawks in the neſt larciny may be committed, but not of hawks eggs, but the takers are puniſhable by fine and impriſonment upon the ſtatute of 11 *H.* 7. *cap.* 17. and 31 *H.* 8. *cap.* 12. (*r*)

Of wild ſwans, nor of their young, larciny cannot be committed, but if they be made tame and domeſtic, or if they be marked and pinioned, it is felony to take them or their young.

But it ſeems, that if they be marked, and yet flying ſwans, that range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, becauſe they cannot be known to belong to any: theſe ſeveral inſtances and differences may be collected from *Co. P. C. p.* 109, 110. *Dalt. cap.* 103. (*ſ*), and 7 *Co. Rep.* 15. *b. Caſe de Swans & libros ibi.*

6. Lar-

(*r*) By this ſtatute it is made felony to take hawks eggs out of any neſts within the king's lands, but this is repeald by the general words of 1 *Mar. cap.* 1.

(*ſ*) *New Edit. cap.* 156. *p.* 499.

6. Larciny cannot be committed in ſome things, whereof the owner may have a lawful property, and ſuch whereupon he may maintain an action of treſpaſs, in reſpect of the baſeneſs of their nature, as maſtiffs, ſpaniels, gray-hounds, blood-hounds, or of ſome things wild by nature, yet reclaimed by art or induſtry, as bears, foxes, ferrets, *&c.* or their whelps or calves, becauſe, tho reclaimed, they ſerve not for food but pleaſure, and ſo differ from pheaſants, ſwans, *&c.* made tame, which, tho wild by nature, ſerve for food.

Only of the reclaimed hawk, in reſpect of the nobleneſs of its nature and uſe for princes and great men, larciny may be committed, if the party know it to be reclaimed.

V. What ſhall be ſaid the perſonal goods of any perſon, or of another perſon.

Every indictment of larciny ought to ſuppoſe the goods ſtolen to be the goods of ſomebody.

An indictment of larciny of the goods *cujuſdam ignoti* is good, for it is at the king's ſuit, and tho the owner be not known, the felony muſt be puniſhed. 21 *H.* 6. *Enditement* 12.

And yet 10 *H.* 6. *Enditement* 9. an indictment, *quod* A. *verberavit* B. and 20 jacks *pretii* 20 *s. felonicè cepit*, held good without ſhewing whoſe they were.

But an indictment of *A.* that he is *communis latro* without ſhewing in particular what he ſtole, is not good. 22 *Aſſiz.* 73.

An indictment, that *bona domûs & eccleſiæ tempore vacationis*, or *bona capellæ in cuſtodia* J. S. *felonicè cepit*, is good, 7 *E.* 4. 14. *b. Co. P. C. p.* 110. *Stamf. P. C. p.* 25. *b. &* 95. *b.*

If a man ſteal bells, or other goods belonging to a church, he may be indicted, *quòd felonicè, &c. cepit bona parochianorum de* B. *M.* 31 *&* 32 *Eliz. B. R. Hadman* and *Green* verſus *Ringwood* (*t*), and yet an action of treſpaſs lies for the churchwardens in ſuch caſe, *quare bona & catalla parochianorum in cuſtodiâ ſuâ*, or *in cuſtodia* A. B. *prædeceſſorum ſuorum gardianorum eccleſiæ cepit & aſportavit ad dammum parochianorum. T.* 36 *Eliz. B. R. Method* and *Barfoot. Dyer* 99.

If *A.* have a ſpecial property in goods, as by pledge, or a leaſe for years, and the goods be ſtolen, they muſt be ſuppoſed in the indictment the goods of *A.* If

(*t*) *Cro. Eliz.* 145, 179.

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If *A.* bail goods to *B.* to keep for him, or to carry for him, and *B.* be robbed of them, the felon may be indicted for larciny of the goods of *A.* or *B.* and it is good either way, for the property is ſtill in *A.* yet *B.* hath the poſſeſſion, and is chargeable to *A.* if the goods be ſtolen, and hath the property againſt all the world but *A.*

A. is indicted, that he ſtole the goods of *B.* and it appears in the indictment, that *B.* was a *feme covert* at the time, the indictment is naught, for they are the goods of her huſband, and ſo if *A.* be indicted for ſtealing the goods of *B.* and upon the evidence it appears, that *B.* had neither intereſt nor poſſeſſion in the goods, or was a *feme covert*, the party ought to be acquitted, but then he may be preſently indicted *de novo* for the goods of the huſband or true proprietor; and ſo it once happend before me at *Aylesbury* 1667. in the caſe of *Emes*, who was convicted and executed upon a ſecond indictment.

Regularly a man cannot commit felony of the goods, wherein he hath a property.

If *A.* and *B.* be joint-tenants or tenants in common of an horſe, and *A.* takes the horſe, poſſibly *animo furandi*, yet this is not felony, becauſe one tenant in common taking the whole doth but what by law he may do.

Yet if *A.* take away the trees of *B.* and cut them into boards, *B.* may take them away, and it cannot be felony; ſo if *A.* take the cloth of *B.* and make it into a doublet, *B.* may take it, and it cannot be felony. *M.* 2 *Eliz. More n.* 67. *p.* 19.

If *A.* take the hay or corn of *B.* and mingles it with his own heap or ſtock, or if *A.* take the cloth of *B.* and embroider it with ſilk or gold, *B.* may retake the whole heap of corn, or cock of hay, or garment and embroidery alſo, and it is no felony, nor ſo much as a treſpaſs. *H.* 36 *Eliz. B. R. Popham n.* 2. *p.* 38.

Yet if *A.* bail goods to *B.* and afterwards *animo furandi* ſteals the goods from *B.* with deſign probably to charge him for them in an action of detinue, this is felony; *quod vide* 7 *H.* 6. 43. *a. Co. P. C. p.* 110. *Stamf. P. C. p.* 26. *a. Kel. C. L. ns.*

The wife cannot commit felony of the goods of her huſband, for they are one perſon in law, 21 *H.* 6. *Corone* 455.

Co. P. C. p. 110. and therefore, if ſhe take or ſteal the goods of her huſband, and deliver them to *B.* who knowing it, carries them away, this ſeems no felony in *B.* for it is taken, *quaſi* by the conſent of her huſband (*u*), yet treſpaſs lies againſt *B.* for ſuch taking, for it is a treſpaſs, but *in favorem vitæ* it ſhall not be adjudged a felony, and ſo I take the law to be notwithſtanding the various opinions. *Dalt. cap.* 104. *p.* 268, 269. *ex lectura Cooke.* (*x*)

But if the huſband deliver goods to *B.* and the wife had taken them felonioufly from *B.* this had been felony in the wife, *Dalt. cap.* 104. *p.* 268. for if the huſband himſelf had taken them felonioufly from *B.* it had been felony, as hath been ſaid; but then it muſt in both caſes be a taking *animo furandi.*

But if a man take away another man's wife againſt her will *cum bonis viri*, this is felony by the ſtatute of *Weſtm.* 2. *cap.* 34. which ſaith, *Habeat rex ſectam de bonis ſic aſportatis* (*y*), 13 *Aſſiz.* 6. But if it be by the conſent of the wife, tho againſt the conſent of the huſband, it ſeems to be no felony, but a treſpaſs, for it cannot be a felony in the man, unleſs it be a felony in the woman, who conſented to it, 13 *Aſſiz.* 6. but *Dalton* thinks it felony, *ubi ſupra.*

Yet in ſome caſes the principal agent may be excuſed from felony, and yet he, that is principal in the ſecond degree, may be guilty, as if a man put a child of ſeven years to take goods, and bring them to him, and he carry them away, the child is not guilty by reaſon of his infancy, yet it is felony in the other.

If *A.* die inteſtate, and the goods of the deceaſed are ſtolen before adminiſtration committed, it is felony, and the goods ſhall be ſuppoſed to be *bona epiſcopi de D.* ordinary of the dioceſe, and if he made *B.* his executor, the goods ſhall be ſuppoſed *bona B.* tho he hath not proved the will, and they need not ſhew ſpecially their title as ordinary or executor, becauſe it is of their own poſſeſſion, in which caſe a general indict-

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(*u*) But in caſe *B.* were her adulterer, Mr. *Dalton* thinks it would be felony, for in ſuch a caſe no conſent of the huſband can be preſumed, *Dalton ubi infra.*

(*x*) *New Edit. cap.* 157. *p.* 304.

(*y*) 2 *Co. Inſtit.* 434.

indictment as well as a general action of treſpaſs lies without naming themſelves executor or ordinary, and ſo for an adminiſtrator.

But if ſervants in the houſe imbezzel their maſter's goods after his deceaſe, this ſeems not to be felony at common law, but only treſpaſs, becauſe the goods were *quodammodo* in their cuſtody; and therefore remedy is provided by the ſtatute of 33 *H.* 6. *cap.* 1. that if they appear not upon proclamation, they ſhall be attaint of felony, but if they appear, they ſhall anſwer for it as a treſpaſs.

But an indictment, *quod invenit hominem mortuum, & felonicè furatus fuit duas tunicas* without ſaying *de bonis & catallis* of the executor or ordinary, is not good, and therefore the party was diſcharged. 11 *R.* 2. *Enditement* 27.

A. digged up a dead body out of the grave, and ſtole his ſhroud, and buried him again, this is reported by Mr. *Dalton*, *cap.* 103. *p.* 266. to be no felony, but a miſdemeanor, for which the party was whipt, and accordingly I have ſeen it reported to be held 16 *Jac.* in *Nottingham*'s caſe (*z*), *quia nullius in bonis*, but ſee *Co. P. C. p.* 110. in *Haine*'s caſe (*a*) ruled by the advice of all the judges to be felony, and in the indictment the goods ſhall be ſuppoſed the goods of the executor, adminiſtrator, or ordinary.

But it is held, that if *A.* put a winding-ſheet upon the dead body of *B.* and after his burial a thief digs up the carcaſe and ſteals the ſheet, he may be indicted for felony *de bonis & catallis A.* becauſe it transferd no property to a dead man. 12 *Co. Rep.* 112.

VI. I come to the ſixth conſideration, who may be ſaid a perſon committing larciny, but of this I have at large treated before *cap.* 3, *&c.* and therefore ſhall ſay but little here.

An infant under the age of diſcretion regularly cannot be guilty of larciny, *viz.* under fourteen years, unleſs it appear by circumſtances, that he hath a diſcretion more than the law preſumes.

A mad-

(*z*) This caſe is mentiond by *Dalton* in the place cited by our author, which in *New Edit.* is *cap.* 156. *p.* 502.

(*a*) 12 *Co.* 112.

A madman, *non compos*, or lunatic in the times of his lunacy cannot commit larciny, but ought to be found not guilty upon due evidence thereof.

A *feme covert* alone may be guilty of larciny, if done without coercion of her huſband. 27 *Aſſiz.* 40.

But it hath generally now obtaind, that ſhe cannot be guilty of larciny jointly with her huſband, becauſe preſumed to be done by coercion of her huſband. *Vide Dalt. cap.* 104. (*b*) *Stamf. P. C. fol.* 26. *a. & libros ibi.*

But this I take to be only a preſumption till the contrary appear, for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by the huſband, but that ſhe was the principal actor and inciter of it, ſhe is guilty as well as the huſband, but *ſtabitur præſumptio, donec probetur in contrarium*, neither is the book of 2 *E.* 3. *Corone* 160. to the contrary, but in the book of 27 *Aſſiz.* 40. where ſhe was indicted alone, inquiry was made, whether it were by coercion of the huſband.

And therefore, if *A.* and *B.* his wife be indicted by theſe names of larciny, the indictment is not void, for the huſband may be convicted, tho the wife be acquitted upon the preſumption of her huſband's coercion.

Again, the huſband may be acquitted, and the wife found to have done the felony alone, for every indictment is ſeveral in law; or again, tho *primâ facie* the wife cannot be guilty of larciny, no nor of burglary, where the huſband is party in the fact, (tho ſhe may be guilty of murder or manſlaughter jointly with her huſband) and therefore *primâ facie* the wife in ſuch caſe muſt be acquitted, yet for my part I think the circumſtances may be ſuch, that the wife may be as well guilty in larciny or burglary, as her huſband.

If a ſervant commit felony by the coercion of his maſter, yet it doth not excuſe the ſervant, tho it excuſe the wife, as is before ſaid, for the wife is inſeparably *ſub poteſtate viri*, but it is not ſo with a ſervant, for as he is not bound to obey his maſter's unlawful commands, ſo he may recover damages for any wrong done him by his maſter. *Dalt. cap.* 104. *p.* 269. (*c*)

CHAP.

(*b*) *New Edit. cap.* 157. *p.* 503. (*c*) *New Edit. p.* 504.

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CHAP. XLIV.

Concerning the diverſities of grand larcinies *among themſelves in relation to* clergy.

ALtho the puniſhment of all grand larciny by the law is death (*a*), yet in relation to clergy, which is a kind of relaxation of the ſeverity of the judgment of law, there is difference made by acts of parliament between ſome larcinies and others.

By the antient privilege of the clergy, and by the confirmation and ſpecial conceſſion of the ſtatute of 25 *E.* 3. *cap.* 4. the benefit of clergy was to be allowd in all treaſons and felonies touching other perſons, than the king himſelf and his royal majeſty.

Therefore as well in grand larciny, as in other felonies, clergy is to be allowd, where it is not taken away by ſome ſubſequent act of parliament.

And in all thoſe caſes, wherein it is ſo taken away, the indictment of ſuch larciny or other felony muſt bring the caſe within the particular proviſion of thoſe ſtatutes, which in ſuch caſes takes away clergy, otherwiſe it is to be allowd, tho upon the evidence it may fall out, that the truth of the fact appears to be ſuch, as is within the ſpecial proviſion of thoſe ſtatutes, that ſo take away clergy.

The ſtatutes therefore, that take away clergy in ſome particular larcinies, are theſe that follow:

I. By the ſtatute of 23 *H.* 8. *cap.* 1. "All perſons found "guilty of robbing any church or chapel, or other holy "places, or of robbing any perſon in his dwelling-houſe, the "owner or dweller of the ſame houſe, his wife, children or "ſervants then being within, and put in fear and dread by

(*a*) In antient times it was in ſome caſes puniſhed with the loſs of a thumb, in others with pillory, and the loſs of an ear. *Coron* 434. *Britt.* 24. *b.*

" the ſame, or for robbing any perſon in or near the high-
" way, and thoſe, that are found guilty of abetting, procu-
" ring, helping, or counſelling thereof, are exempt from the
" benefit of clergy, except ſuch as are in the order of ſub-
" deacon.

But upon this ſtatute, tho there muſt be a ſtealing of goods, there need not be an actual breaking (*b*), for the ſtealing in the houſe, and putting the dweller, his wife or ſervants in fear, is robbery.

This ſtatute extended only to a conviction by verdict or confeſſion, but the ſtatute of 25 *H.* 8. *cap.* 3. extended it to a ſtanding mute, or challenging of above the number of twenty, or not directly anſwering, and alſo in caſe of an arraignment of a priſoner for a felony by bringing the goods he ſtole into one county, where he had firſt ſtolen the goods in a forein county, in one of thoſe manners mentiond in the ſtatute of 23 *H.* 8. it gave power to the juſtices, upon examination of the fact, to put the priſoner from his clergy, but herein theſe things were obſervable: 1. It did not give power of examination, where the priſoner confeſſed the felony, but where he put himſelf upon his trial. 2. Theſe examinations need not be recorded. 3. It did extend only to thoſe caſes, where the priſoner was to be ouſted of his clergy by force of the ſtatute of 23 *H.* 8. and not to other caſes, where he was to be ouſted of his clergy by any ſubſequent ſtatute, and therefore upon a robbery in a dwelling-houſe, where the owner, his wife or ſervants were within, and not put in fear, he could not be ouſted of his clergy by examination in a forein county upon the ſtatute of 25 *H.* 8. *Anderſ. Rep. n.* 158. *p.* 114. *Co. P. C. cap.* 52. *p.* 115.

And therefore it was ruled in one *Cole*'s caſe, a woman broke a dwelling-houſe in *Kew* in the day-time, none being there, and took away goods above the value of five ſhillings, and under the value of ten ſhillings, and carried the goods into

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(*b*) In the caſe of robbing a church there muſt be an actual breaking to bring it within this ſtatute; but by 1 *E.* 6. *cap.* 12. it is not neceſſary, for by that ſtatute all felonious taking of goods out of a church or chapel is ouſted of clergy in all caſes, except that of challenging above twenty, which defect is ſupplied by 3 & 4 *W.* & *M. cap.* 9.

into *Suſſex*, where ſhe was indicted of larciny, and upon examination it appeard ſhe had broke the houſe, and took the goods *ut ſupra*, being above five ſhillings and under ten ſhillings, and the jury found accordingly, and ſhe was burnt in the hand, and diſcharged, for a man in ſuch a caſe ſhould have had his clergy in the county of *Suſſex*, becauſe tho the ſtatute of 39 *Eliz. cap.* 15. take away clergy in the proper county, yet the ſtatute of 25 *H.* 8. as to examination and taking away clergy in a forein county extends only to felonies put out of clergy by 23 *H.* 8. or 5 *&* 6 *E.* 6. *cap.* 10. *coram domino* Bridgman *in* Suſſex *ex libro ſuo.*

Again, the ſtatutes of 23 *H.* 8. and 25 *H.* 8. did put acceſſaries before in ſuch caſes from the benefit of their clergy, as well as the principals, but as to that they are repeald by 1 *E.* 6: *cap.* 12.

But by the ſtatute of 1 *E.* 6. *cap.* 12. tho the ſtatute of 23 *H.* 8. be re-enacted as to the principals in the caſes before mentiond, and alſo in caſes of breaking of houſes to the intent to ſteal, (any perſon being therein, and put in fear) if convict by verdict or confeſſion, or ſtanding mute, and not directly anſwering, yet it hath this general clauſe, *and in all other caſes offenders ſhall have benefit of their clergy*, and therefore by this act theſe changes were wrought.

1. In the caſes, where clergy was excluded by this act, there is no ſaving for perſons in holy orders.

2. It repeald the ſtatute of 25 *H.* 8. *cap.* 3. as to examination in a forein county, and for that reaſon the ſtatute of 5 *&* 6 *E.* 6. *cap.* 10. was made, whereby that ſtatute was revived, and ſtands now in force in every article thereof.

3. It reſtored clergy to acceſſaries before in all thoſe caſes, wherein they were ouſted of clergy by 23 and 25 *H.* 8. and therefore the ſtatute of 4 *&* 5 *Ph. & M. cap.* 4. was made, whereby acceſſaries before in murder, or robbery in any dwelling-houſe, or in or near the highways, are ouſted of clergy upon conviction, outlawry, ſtanding mute, or challenging above twenty, or not directly anſwering.

So that the ſtatutes of 23 and 25 *H.* 8. ſtand at this day in force with this addition, that perſons in holy orders ſtand

equally

equally exempt from the benefit of clergy with others by the ſtatute of 1 E. 6. as to caſes within that ſtatute.

But if only a ſtranger were in the houſe, and neither the owner, his wife, children, or ſervants, this gives no diſcharge of clergy by the ſtatute of 23 H. 8. and therefore there was proviſion in that caſe by the enſuing ſtatute.

II. By the ſtatute of 1 E. 6. *cap.* 12. breaking of any houſe by night or by day, any perſon being in the houſe or put in fear, if it were with an intent to ſteal, tho nothing be ſtolen, a principal was excluded from clergy in all caſes, except outlawry and challenging above twenty.

And alſo in a forein county, yet if upon examination it be ſo found, he is ouſted of clergy by the ſtatute of 5 & 6 E. 6. *cap.* 10. but the acceſſary before or after is not ouſted of clergy by this ſtatute.

III. By the ſtatute of 5 & 6 E. 6. *cap.* 9. "If any perſon "be found guilty according to the laws of the land for rob-"bing any perſon or perſons in his or their dwelling-houſes, "or dwelling-places, the owner or dweller, his wife, chil-"dren or ſervants being within the ſame houſe or place, or "in any place within the precincts thereof, ſuch offender "ſhall not be admitted to clergy, whether the owner or "dweller, his wife or children, then or there being, ſhall "be waking or ſleeping.

"And alſo he, that robs any perſon in any booth or tent, "in any fair or market, his wife, children or ſervant then "being within the booth or tent, ſhall be excluded from "clergy.

This ſtatute is of force, and of great and daily uſe, and therefore it will be convenient to make ſome obſervations upon it.

Upon this ſtatute theſe things are obſervable:

1. That it extends not to ouſt clergy in any caſe but upon conviction of the offender, either by verdict or confeſſion, for a man that confeſſeth is found guilty by his confeſſion, but it extends not to ſtanding mute, challenging above twenty, or not directly anſwering. (*c*)

And

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(*c*) But by 3 & 4 *W.* & *M.* *cap.* 9. it extends to all theſe caſes, as alſo to the caſe of an outlawry.

And therefore it is conſiderable, whether, if a man be attaint by outlawry, he may not be admitted to his clergy as a clerk attaint, which, tho it avoid not the attainder, yet it may take off the execution, for clergy is allowable to a perſon attaint, if the caſe be within clergy, *Crompt. Juriſdic. of Courts* 126. *b.* (*d*) *Dy.* 205. *a. b.* and it is held, outlawry upon this ſtatute excludes not clergy. 11 *Co. Rep.* 29. *b. Poulter's* caſe.

2. That yet by the ſtatute of 4 & 5 *P. & M. cap.* 4. clergy is taken away in this caſe from the acceſſary before, as well as in caſe of ſtanding mute and challenging above twenty, or not directly anſwering, for the ſtatute of 4 & 5 *P. & M.* extends to acceſſaries before in all caſes of robbing in dwelling-houſes, as well thoſe within this ſtatute, as thoſe upon the ſtatute of 23 *H.* 8.

3. It hath been held by good opinion, that this ſtatute extends only to him, that actually enters the houſe and ſteals there, and that therefore if *A. B.* and *C.* come to a houſe in the day-time with an intent to enter, and ſteal goods, and that *A.* only breaks and enters the houſe, and takes the goods, that *A.* only ſhall be excluded of his clergy, and *B.* and *C.* that were aiding and aſſiſting ſhould have their clergy: this was the opinion of divers judges at a meeting in *Serjeants-inn* 30 *Novemb.* 1664. who grounded themſelves principally upon *Audley's* caſe (*e*) upon the ſtatute of 39 *Eliz.* hereafter cited: but I think they are all to be excluded of their clergy upon this ſtatute of 5 & 6 *E.* 6. and there cannot be a ſtronger authority in it, than the judgment of parliament in the ſtatute of 4 & 5 *P. & M. cap.* 4. whereby it is enacted, "That "if any perſon ſhall maliciouſly command, hire, or counſel "any perſon to commit any robbery in any dwelling-houſe, "he ſhall be excluded of clergy.

And certainly he, that is preſent, aiding, and abetting, is more than an acceſſary before, but then perchance the indictment muſt not run generally, *was preſent, aiding, and abetting*, but that B. *and* C. *did maliciouſly command, hire, or counſel* A. *to commit the fact*, *Dy.* 183. *b.* 11 *Co. Rep.* 37. *a. Poulter's* caſe,

(*d*) *Crompt. Juſtice* 119. *b.* and *Fincher's* caſe.

(*e*) *Cro. Car.* 473. by the name of *Evans*

tho in my own opinion the words *maliciouſly preſent, aiding, and abetting*, do countervail the former, and much more, and it cannot be intended, that the ſtatute meant to take away clergy from thoſe, that maliciouſly counſel or command, which at moſt makes but an acceſſary, and yet that he, that is preſent, and abetting, ſhall have his clergy.

But in my opinion all may be indicted, *quod fregerunt & intraverunt, &c.* as in caſe of burglary or robbery, and it differs from the ſtatute of 39 *Eliz.* and the rather, becauſe the ſtatute of 4 & 5 *P. & M.* extends not to offenſes made after by 39 *Eliz.*

4. This ſtatute extends not to breaking of the houſe with an intent to rob it, but there muſt be an actual robbing, or taking away goods.

5. The robbing by day or night is within this ſtatute.

6. The dweller, his wife, children or ſervants muſt be within the precinct of the houſe ſleeping or waking, but it is not neceſſary they ſhould be put in fear, neither is it neceſſary they ſhould be in the ſame room, where the robbery is done.

7. But it is not enough, that a ſtranger be in the houſe, unleſs the owner, his wife, children, ſervants or ſome of them be in the houſe at the time alſo, tho it be enough upon the ſtatute of 1 *E.* 6. *cap.* 12.

8. There muſt be not only an actual ſtealing of ſome goods in the houſe, but an actual breaking of the houſe, for the ſtatute ſpeaks of robbing, which imports more than a bare taking of goods.

Aug. 14 *Car.* 1. *Thomas Williams, Thomas Bates*, and *Richard Harper* having broken the lodgings of Sir *H. Hungate* at *Whitehall*, and taken thence ſeveral goods of Sir *H. Hungate*, *Croke* and *Crawley* were adviſed with to pen the indictment, who agreed theſe points: 1. It muſt be laid for breaking the king's manſion-houſe called *Whitehall* (*f*), and ſtealing the goods of Sir *H. Hungate*, for all the lodgings in *Whitehall* were part of the king's houſe, and differd from an inn of court, where each chamber is a ſeveral manſion-houſe, becauſe every one hath

I a ſeve-

(*f*) See *Kel.* 27.

a ſeveral intereſt in his chamber. 2. That upon the ſtatute of 5 & 6 *E.* 6. the indictment need only be, that he broke the king's houſe called *Whiteball*, and ſtole the goods of Sir *H. Hungate*, divers of the king's ſervants then being in the houſe, without ſaying, that any body was put in fear (which was neceſſary by the ſtatute of 23 *H.* 8.) but merely upon the ſtatute of 5 & 6 *E.* 6. and accordingly the indictment was drawn. 3. That upon an indictment upon 23 *H.* 8. or upon 5 *E.* 6. there muſt be an actual breaking of the houſe, and alſo a robbery or ſtealing of ſome thing.

4. That if a thief come into the houſe, the doors being open, and then break open a chamber-door, and ſteal goods from thence, this is a breaking of the houſe within thoſe ſtatutes, and accordingly at the gaol-delivery at the *Old-Baily* 29 *Aug.* 14 *Car.* 1. thoſe two juſtices being preſent, they were indicted, and *Harper* being fled, the other two were found guilty; *Williams* was reprieved before judgment, but *Bates* was executed, *ex libro Twiſden.*

Upon this latter reſolution it ſeems, that *Bayne's* caſe in *Popham's Rep.* 36 & 37 *Eliz. n.* 10. was ſomewhat too ſevere (*g*), where one came into a tavern to drink, and ſtole a cup that was brought them to drink in, the owner and his ſervants being in the houſe, and upon this he was ouſted of his clergy upon the ſtatute of 5 & 6 *E.* 6. which caſe was doubted by the juſtices upon a meeting among them *Novemb.* 1664. but it was then agreed, if two come into a tavern to drink, the door being open, and divers of the family being in the houſe, and one goes up ſtairs and breaks a chamber-door, and ſteals goods, and both depart before the felony be diſcoverd; reſolved by us all, that clergy is taken away from him, that breaks open the door, if he be indicted upon the ſtatute of 5 *E.* 6. but not from the other, for the breaking of the door was an act of violence, and ſo the breaking of a counter or cheſt (*h*); for a cheſt *vide poſtea.*

But tho the breaking of the door, or perchance of a counter, may be ſuch an act, as may make it a robbery within the ſtatute of 5 *E.* 6. yea, and altho in that caſe before-mentiond,

(*g*) This caſe denied to be law, *Kel.* 68. (*h*) See *Kel.* 69.

tiond, and in a caſe upon a ſpecial verdict out of *Cambridge-ſhire* before-mentiond, it was held the breaking of a cheſt was all one as to this purpoſe with the breaking of a door, tho the cheſt were not fixed to the freehold, *quod vide antea cap.* 43. yet I muſt needs ſay, that the courſe at *Newgate* hath been always ſince my time, that the breaking open of a chamber-door, and of a counter or cupboard fixed to the freehold, hath brought it within the ſtatute of 5 *E.* 6. to ouſt of clergy, yet when a party enters the doors open, and breaks up only a cheſt or trunk, and ſteals thence goods, that is not ſuch a robbery, as is within the ſtatute of 5 *E.* 6. to ouſt of clergy, and ſo was the difference agreed at *Newgate* 1671. upon the robbery of the cook of *Serjeants-inn* in *Fleet-ſtreet* by certain perſons, that came in to eat, and ſlipt up ſtairs, and picked open a chamber-door, and broke open a cheſt, and ſtole plate of good value: it was agreed, that the picking open the lock of the chamber-door brought it within the ſtatute to ouſt clergy, but the breaking open of a cheſt or trunk only would not ouſt clergy upon the ſtatute of 5 *E.* 6. or 39 *Eliz.* and ſo by *Lee* ſecondary was the conſtant courſe at *Newgate* in his time.

Le. Kyl. C. L. 109

As to robbery in booths or tents in fairs and markets within the 5 *E.* 6. *cap.* 12. *H.* 41 *Eliz. B. R.* the robbing of a ſhop in *Weſtminſter-hall* was ruled not to be within this ſtatute to be ouſted of clergy.

If a ſervant open a chamber-door in his maſter's houſe, and ſteals goods, Sir *N. Hyde*, who was ſevere enough in caſes criminal, doubted whether this were within this ſtatute to ouſt him of his clergy: *vide infra.*

IV. The next ſtatute relating to this matter of robbing in houſes is 39 *Eliz. cap.* 15. which recites, that the penalty of robbing of houſes in the day-time, no perſons being in the houſe at the time of the robbery committed, is not ſo penal, as robbery in any houſe, any perſon being therein at the time of the robbery committed, which hath emboldened perſons to commit heinous robberies in breaking and entring perſons houſes, none being in the ſame, and enacts, "That if any "perſon ſhall be found guilty by verdict, confeſſion, or other-

" wiſe for the felonious taking away in the day-time of mo-
" ney, goods, or chattels to the value of five ſhillings or up-
" wards in any dwelling-houſe, or any part thereof, or any
" out-houſe or out-houſes belonging and uſed with the ſaid
" dwelling-houſe or houſes, altho no perſon ſhall be in the
" ſaid houſe or houſes at the time of the felony commit-
" ted, every ſuch perſon ſhall be excluded from the benefit
" of clergy.

Upon this ſtatute theſe things are obſervable;

1. That the indictment, whereupon ſuch perſon is to be excluded of the benefit of his clergy, ought preciſely to follow the ſtatute, *viz.* it muſt be in the day-time, and no perſon being in the houſe, and muſt appear to be ſo upon evidence.

2. And therefore, if either the indictment purſue not the ſtatute, or the evidence make not good the indictment, he is to have his clergy, and therefore upon ſuch an indictment he may be acquitted of ſtealing againſt the form of the ſtatute, and found guilty of ſimple felony at common law, tho the indictment conclude *contra formam ſtatuti*; and the ſame law it is, if an indictment be formed upon the ſtatute of 23 *H.* 8. or 5 *&* 6 *E.* 6. for tho the indictments in thoſe caſes be ſpecial, and conclude ſometimes *contra formam ſtatuti*, yet they include felony at common law, and tho the indictment concluding *contra formam ſtatuti* be good, it is not neceſſary, ſo as the circumſtances required by the ſtatute be purſued, for the ſtatutes in theſe caſes make not the felony, but only exclude clergy, when the felony is ſo circumſtantiated, as the ſtatute mentions, and is ſo expreſſed in the indictment.

3. If the indictment be formed upon this ſtatute, as that he broke and entred the houſe in the day-time, and ſtole, no perſon being in the houſe, if it appear upon the evidence, that the felony was committed without theſe circumſtances, as if it were committed in the night, or not in the day, ſo that it is burglary, or if committed when ſome of the family were in the houſe, in which caſe he had been ouſted of his clergy by the ſtatute of 5 *&* 6 *E.* 6. if the indictment had been formed upon that ſtatute, yet in ſuch caſe the offender being ſpecially indicted upon the ſtatute of 39 *Eliz.* ſhall be

found guilty of ſimple felony at common law, and ſhall not be ouſted of his clergy by the ſtatutes of 23 *H.* 8. 1 *E.* 6. 5 & 6 *E.* 6. or 18 *Eliz. cap.* 7. becauſe the indictment is not formed upon thoſe ſtatutes, but only upon 39 *Eliz.* and if the circumſtances of the ſtatute of 39 *Eliz.* upon which the indictment is formed, be not purſued in the evidence, he muſt have his clergy, and ſo is the conſtant practice.

4. Altho this ſtatute of 39 *Eliz.* in the body of the act ſpeaks only of ſtealing, yet in as much as the preamble ſpeaks of robbery, it hath been always taken, that upon this ſtatute, as well as upon the ſtatute of 5 *E.* 6. there muſt theſe three things concur to ouſt clergy: 1. There muſt be *an actual ſtealing* or taking away of goods of ſome value upon the ſtatute of 5 & 6 *E.* 6. and of goods to the value of five ſhillings upon this ſtatute, but it is not neceſſary, that the goods be carried out of the houſe, for if he take them out of a trunk or cupboard, and lay them in the room, and be apprehended before he carry them away, it is a ſtealing within the ſtatutes, and at common law alſo, as was reſolved by all the judges, *uno diſſentiente*, in a caſe out of *Cambridgeſhire* upon a ſpecial verdict there found upon an indictment upon the ſtatute of 5 & 6 *E.* 6. *anno* 1664. (*i*). 2. It muſt be a ſtealing of goods *in the houſe*, and therefore he that ſteals, or is party to the ſtealing them, being out of the houſe, is not by this ſtatute to be ouſted of his clergy. 3. Upon this ſtatute, as well as upon the ſtatute of 5 & 6 *E.* 6. there muſt be ſome act of force or *breaking*. (*k*)

Now what ſhall be ſaid ſuch a force, as muſt bring the party within this ſtatute, hath been touched before, to which I add, 1. That whatſoever breaking will make a burglary, if it were in the night, will make ſuch a force or breaking, as is within this ſtatute and that of 5 *E.* 6. to ouſt the thief of his

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(*i*) This was *Simpſon*'s caſe mentiond below, and is reported *Kel.* 31.

(*k*) But now by 10 & 11 *W.* 3. *cap.* 23. "Whoever by night or day ſhall in any "ſhop, ware-houſe, coach-houſe or ſtable "privately and feloniouſly ſteal to the va-"lue of 5 *s.* or more, tho ſuch ſhop be "not broke open, nor any perſon therein, "or ſhall aſſiſt, hire, or command any "perſon to commit ſuch offenſe, ſhall be "excluded from the benefit of clergy. And by 12 *Ann. cap.* 7. "Whoever "ſhall feloniouſly ſteal to the value of "40 *s.* in any dwelling-houſe or out-"houſe thereto belonging, altho it be "not broken, nor any perſon therein, "their aiders or aſſiſters are excluded "from clergy.

his clergy, as if he break open the outward or inward door of the houſe, pick the lock of ſuch door, draw the latch, break open the window, *&c.* 2. Some breaking or force will ouſt clergy upon the ſtatutes of 5 & 6 *E.* 6. and 39 *Eliz.* which will not make a burglary, if it were in the night, as where he enters by the doors open, and breaks open a counter or cupboard fixed to the freehold, as was agreed in the *Cambridgeſhire* caſe before-mentiond.

T. 16 *Car.* 2. *Simſon*'s caſe, where the caſe was thus: a man came into a dwelling-houſe, none being within, and the doors being open, and broke up a cheſt, and took out goods to the value of five ſhillings, laid them on the floor, and before he could carry them out of the chamber, he was apprehended, and upon this matter ſpecially found he was ouſted of his clergy upon the ſtatute of 39 *Eliz.* for the taking of them out of the cheſt was felony by the common law, and the ſtatute of 39 *Eliz.* did not alter the felony, but only excluded clergy; *per omnes juſticiarios* Angliæ. *Ex libro* Bridgman.

See this Caſe better ſtated 2. H. H. P. C. 358. See Kyl. C. L. 108, 9. Kirk. 31.

But whereas in that caſe the breaking open of the cheſt was held ſuch a force or breaking, as excludes clergy upon that ſtatute, I have obſerved, that the conſtant practice at *Newgate* hath not allowed that conſtruction, unleſs it was a counter or cupboard fixed; yet *note*, this reſolution of 16 *Car.* was by all the judges of *England* then preſent, and tho one diſſented, he after came about to the opinion of the reſt. *Ideo quere.*

T. 13 *Car.* 1. *B. R. Evans* and *Finch* (*l*) were arraigned at *Newgate* upon an indictment, that they at twelve of the clock in the day *domum manſionalem* Hugonis Audely *de interiori templo, nullâ perſonâ in eadem domo exiſtente, fregerunt, &* 40 *l.* from thence did ſteal, a ſpecial verdict was found, that *Evans* by a ladder climbed up to the upper window of the chamber of *H. Audely*, and took out of the ſame forty pounds, and *Finch* ſtood upon the ladder in view of *Evans*, and ſaw *Evans* in the chamber, and was aſſiſting to the robbery, and took part of the money, and that at the time of the robbery divers perſons were in the *Inner Temple-hall*, and in divers other parts

(*l*) *Cro. Car.* 473.

parts of the houſe; ruled, 1. That a chamber in an inn of court is *domus manſionalis* within the ſtatute of 39 *Eliz.* of him, who was the owner of the chamber. 2. That altho this chamber was parcel of the *Inner Temple*, and other perſons were in the hall and other parts of the *Inner Temple*, yet no perſon being in the chamber, this offenſe was within the ſtatute of 39 *Eliz.* and ſo it differs from the caſe of *Whitehall* before-mentiond, where the indictment was upon the ſtatute of 5 & 6 *E.* 6. 3. That in as much as *Evans* was only in the chamber, and *Finch* entred not the chamber, *Evans* had judgment of death, and *Finch* had his clergy.

And the like law had been upon the ſtatute of 5 & 6 *E.* 6. as is before declared, for theſe ſtatutes only exclude the parties, that actually take out of the dwelling-houſe, not thoſe that are preſent and aſſenters (*m*), as hath been alſo before declared (*n*) upon the ſtatute of 1 *Jac.* of ſtabbing.

And herein it differs from burglary and robbery, for therein all perſons, that are preſent, aiding, and aſſiſting, are equally burglars or robbers with him, that enters or actually takes; but of this hereafter.

But this ſtatute of 39 *Eliz.* takes not away the benefit of clergy, where the offender ſtands mute, but only in the caſe of conviction by verdict, confeſſion, or otherwiſe according to the laws of the realm; *quære* of outlawry, for there the party is attaint indeed, but not found guilty, for if he reverſe the outlawry, he ſhall plead to the felony. (*o*)

And thus far for thoſe larcinies, that relate to the dwelling-houſe of any wherein clergy is excluded.

V. The next ſtatute, that excludes from clergy, is the ſtatute of 1 *E.* 6. *cap.* 12. and 2 & 3 *E.* 6. *cap.* 33. which exclude clergy from any perſon convict by verdict or confeſſion of ſtealing any horſe, mare, or gelding, or wilfully ſtanding mute.

But

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(*m*) But by 3 & 4 *W.* & *M. cap.* 9. clergy is taken away from all, who comfort, aid, abet, aſſiſt, counſel, hire, or command any perſon feloniouſly to break any dwelling-houſe, ſhop, or ware-houſe thereto belonging, and feloniouſly to take away any money, goods, &c. to the value of 5 *s.* or upwards, altho no perſon be within the ſame.

(*n*) *Vide antea* p. 468.

(*o*) But now by 3 & 4 *W.* & *M. cap.* 9. clergy is expreſly taken away in caſe of outlawry, or of ſtanding mute, &c.

But it takes not away clergy from acceſſaries before or after.

VI. The ſtatute of 8 *Eliz. cap.* 4. by which he that takes money or goods feloniouſly from the perſon of any other, privily, without his knowledge, is ouſted of his clergy, if convict by verdict or confeſſion, or if he challenge above twenty peremptorily, or ſtands mute, or will not directly anſwer, or be outlawed.

Upon this ſtatute theſe things are obſervable: 1. It doth not alter the nature of the felony, and therefore, if what he take away ſo be not above the value of twelve-pence, it is only petit larciny, as it was before, and ſo differs from the caſe of robbery, *Co. P. C. cap.* 16. *p.* 68. *Crompt. de Pace, fol.* 33. *b.* 2. The indictment muſt be purſuant to the ſtatute, *viz. quod felonicè &c. clam & ſecretè a perſonâ &c. cepit*, otherwiſe the offender hath his clergy. 3. It doth not ouſt acceſſaries of their clergy, nor it ſeems doth it ouſt any of his clergy but him, that actually picks the pocket, and not thoſe that are preſent, aiding and aſſiſting, upon the reaſon of *Evan*'s caſe before, for it ſhall be taken literally.

By an act of this parliament, *viz.* * * * (*p*)

(*p*) This was left unfiniſhed by our author, but I ſuppoſe the ſtatute here meant is 22 *Car.* 2. *cap.* 5. by which "All who ſhall feloniouſly ſteal woollen "manufactures from the tenters, or ſhall "embezzel the king's naval ſtores, are "excluded from clergy.

As to ſubſequent ſtatutes, which take away clergy from larciny in dwelling-houſes, *vide poſtea ſub fine cap.* 48.

CHAP. XLV.

Concerning petit larciny.

PEtit larciny is the felonious ſtealing of money or goods not above the value of twelve-pence without robbery, for altho that by ſome opinions the value of twelve-pence make grand larciny, 22 *Aſſiz.* 39. *per Thorp*, yet the law is ſettled, that it muſt exceed twelve-pence to make grand larciny. *Weſt.* 1. *cap.* 15. (*a*). 8 *E.* 2. *Coron.* 404.

The judgment in caſe of petit larciny is not loſs of life, but only to be whipt, or ſome ſuch corporal puniſhment leſs than death, and yet it is felony, and upon the conviction thereof the offender loſeth his goods, for the indictment runs *felonicè*. 27 *H.* 8. 22.

A party indicted of petit larciny and acquitted, yet if it be found he fled for it, forfeits his goods, as in caſe of grand larciny. 8 *E.* 2. *Coron.* 406. *Stamf. P. C. p.* 184. *a.*

But in caſe of petit larciny there can be no acceſſaries neither before nor after. *P.* 9 *Jac.* 12 *Co. Rep.* 81.

If two or more be indicted of ſtealing goods above the value of twelve-pence, tho in law the felonies are ſeveral, yet it is grand larciny in both. 8 *E.* 2. *Coron.* 404.

But if upon the evidence it appears, that *A.* ſtole twelve-pence at one time, and *B.* twelve-pence at another time, ſo that the acts themſelves were ſeveral at ſeveral times, tho they were the goods of the ſame perſon, this is petit larciny in each, and not grand larciny in either.

If *A.* be indicted of larciny of goods to the value of five ſhillings, yet the petit jury may upon the trial find it to be but of the value of twelve-pence, or under, and ſo petit larciny. 41 *E.* 3. *Coron.* 451. 18 *Aſſiz.* 14. *Stamf. P. C. p.* 24. *b.*

If

(*a*) 2 *Co. Inſtit.* 190.

If *A.* ſteal goods of *B.* to the value of ſix-pence, and at another time to the value of eight-pence, ſo that all put together exceed the value of twelve-pence, tho none apart amount to twelve-pence, yet this is held grand larciny, if he be indicted of them altogether, *Stamf. P. C. p.* 24. collected from the book of 8 *E.* 2. *Coron.* 415. *Dalt. cap.* 101. *p.* 259. (*b*)

But if the goods be ſtolen at ſeveral times from ſeveral perſons, and each a-part under value, as from *A.* four-pence, from *B.* ſix-pence, from *C.* ten-pence, theſe are ſeveral petit larcinies, and tho contained in the ſame indictment make not grand larciny.

But it ſeems to me, that if at the ſame time he ſteals goods of *A.* of the value of ſix-pence, goods of *B.* of the value of ſix-pence, and goods of *C.* of the value of ſix-pence, being perchance in one bundle, or upon a table, or in one ſhop, this is grand larciny, becauſe it was one entire felony done at the ſame time, tho the perſons had ſeveral properties, and therefore, if in one indictment, they make grand larciny.

If *A.* ſteal *clam & ſecrete* out of the pocket of *B.* twelve-pence, tho the ſtatute of 8 *Eliz.* take away clergy from a pick-pocket, yet it is but petit larciny; *quod vide ſupra p.* 529.

And ſo if a man could poſſibly ſteal a horſe of the value of twelve-pence only, or under, or break a houſe in the day-time, and ſteal goods only of the value of twelve-pence, the owner, his wife or children being in the houſe, and not put in fear, this will be but petit larciny notwithſtanding the ſtatute of 5 & 6 *E.* 6. take away clergy, for that ſtatute altered not the nature of the offenſe, but takes away clergy, where clergy was before, namely where the offenſe was capital, as in caſe of grand larciny.

But if they were put in fear, then it would be robbery, how ſmall ſoever the value were, and ſo could not ſink into the nature of petit larciny; but of this in the next chapter.

CHAP.

(*b*) *New Edit. cap.* 134. *p.* 494.

CHAP. XLVI.

Of robbery.

ROBbery is the felonious and violent taking of any money or goods from the perſon of another, putting him in fear, be the value thereof above or under one ſhilling.

In this caſe it is to be conſidered, 1. What is a felonious taking from the perſon. 2. Who ſhall be ſaid a felonious taker from the perſon of a man. 3. What violence or putting in fear is requiſite to make up robbery. 4. In what caſes ſuch a robber is admiſſible to his clergy.

As to the firſt.

1. There muſt be in caſe of robbery, (as alſo in all caſes of larciny) ſomething felonioufly taken, for altho antiently an aſſault to the intent to rob, or an attempt to rob was reputed felony, *voluntas reputabatur pro facto*, 25 *E.* 3. 42. 13 *H.* 4. 7. *per Gaſcoigne* 27 *Aſſiz.* 38. yet the law is held otherwiſe at this day (*a*), and for a long time ſince the time of *Edward* III. and therefore if *A.* lie in wait to rob *B.* and aſſault him to that purpoſe, and require him to deliver his purſe, yet if *de facto* he hath taken nothing from him, this is not felony, but only a miſdemeanor, for which he is puniſhable by fine and impriſonment. 9 *E.* 4. 26. *b. Stamf. P. C. p.* 27. *b. Co. P. C. p.* 68.

There is a double kind of taking, *viz.* a taking in law, and a taking in fact.

If thieves come to rob *A.* and finding little about him enforce him by menace of death to ſwear upon a book to fetch them a greater ſum, which he doth accordingly, this is a taking by robbery, yet he was not in conſcience bound by ſuch compelled oath, for the fear continued, tho the oath bound him not, and in that caſe the indictment need not be ſpecial,

(*a*) *Plowd. Com.* 259. *b.*

cial, for that evidence will maintain a general indictment of robbery, 44 *E.* 3. 14. *b.* 4 *H.* 4. 2. *a.* *Co. P. C. p.* 68. *Dalt. cap.* 100. *p.* 257. (*b*), who ſaith it was ſo adjudged alſo in *P.* 36 *Eliz.*

If *A.* aſſaults *B.* and bids him deliver his purſe, and *B.* delivers it accordingly, this is a taking, and ſo it is if *B.* refuſe, and then *A.* prays him to give or lend him money, which *B.* doth accordingly, this is robbery, for *B.* doth it under the ſame fear, *Dalt. cap.* 100. 44 *Eliz. Cromp.* 34. *b.* ſo it is if *B.* throw his purſe or cloak in a buſh, and *A.* takes it up and carries it away; ſo if *B.* flying from the thief lets fall his hat, and the thief take it and carry it away, for all is the effect of the ſame fear. *Dalt. ubi ſupra.*

So if *A.* without drawing his weapon requires *B.* to deliver his purſe, who doth deliver it, and *A.* finding but two ſhillings in it gives it him again, this is a taking by robbery. 20 *Eliz. Crompt.* 34. *Dalt. ubi ſupra.*

If *A.* have his purſe tied to his girdle, *B.* aſſaults him to rob him, and in ſtrugling the girdle breaks, and the purſe falls to the ground, this is no robbery, becauſe no taking; but if *B.* take up the purſe, or if *B.* had the purſe in his hand, and then the girdle break, and ſtriving lets the purſe fall to the ground, and never takes it up again, this is a taking and robbery. *Co. P. C. p.* 69. *Dalt. cap.* 100. *Crompt. fol.* 35.

It is not always neceſſary, that in robbery there ſhould be ſtrictly a taking from the perſon, but it ſufficeth if it be in his preſence, as appears by ſome of the former inſtances, in caſe it be done with a putting in fear: as where a carrier drives his pack-horſes, and the thief takes his horſe, or cuts his pack, and takes away the goods; ſo if a thief come into the preſence of *A.* and with violence, and putting *A.* in fear, drives away his horſe, cattle, or ſheep. *Dalt. ubi ſupra.* *Stamf. P. C. p.* 27. *a.*

II. Who ſhall be ſaid a perſon robbing or taking.

If ſeveral perſons come to rob a man, and they are all preſent, and one only actually take the money, this is robbery in all.

(*b*) *New Edit. cap.* 153. *p.* 492.

Pudſey and two others, *viz.* *A.* and *B.* aſſault *C.* to rob him in the highway, but *C.* eſcapes by flight, and as they were aſſaulting him *A.* rides from *Pudſey* and *B.* and aſſaults *D.* out of the view of *Pudſey* and *B.* and takes from him a dagger by robbery, and came back to *Pudſey* and *B.* and for this *Pudſey* was indicted and convict of robbery, tho he aſſented not to the robbery of *D.* neither was it done in his view, becauſe they were all three aſſembled to commit a robbery, and this taking of the dagger was in the mean time. 28 *Eliz. B. R. Cromp.* 34.

And ſo it is if *A. B.* and *C.* come to commit a robbery, and *A.* ſtands centinel at the hedge-corner to watch if any come, and *B.* and *C.* commit the robbery, tho *A.* was not actually preſent, nor within view, but at a diſtance from them; and the like in burglary. 11 *H.* 4. 13. *Co. P. C. p.* 64.

III. What ſhall be ſaid a putting in fear, or violent taking.

Without putting in fear or violence it is not robbery, but only larciny, and the indictment muſt run, *quod vi & armis apud* B. *in regiâ viâ ibidem &c.* 40 *s. in pecuniis numeratis felonicè & violenter cepit a perſonâ*; and therefore if the word *violenter* be omitted in the indictment, or not proved upon the evidence, tho it were *in altâ viâ regiâ & felonicè cepit à perſona*, it is but larciny, and the offender ſhall have his clergy. *Dy.* 224. *b. H.* 17 *Jac.* in *B. R.* (*c*). *Harman* was indicted of the robbery of *Halfpenny* in the highway, and upon the evidence it appeared, that *Harman* was upon his horſe, and required *Halfpenny* to open a gap for him to go out, *Halfpenny* going up the bank to open the gap, *Harman* came by him, and ſlipt his hand into his pocket, and took out his purſe, *Halfpenny* not ſuſpecting the taking of his purſe, until turning his eye he ſaw it in *Harman*'s hand, and then he demanded it, *Harman* anſwerd him, *Villain if thou ſpeakeſt of thy purſe, I will pluck thy houſe over thine ears, and drive thee out of the country, as I did* John Somers, and then went away with his purſe, and becauſe he took it not with ſuch violence, as put *Halfpenny* in fear, it was ruled to be but ſtealth, and not robbery, for the words of menace were uſed after

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(*c*) 2 *Rol. Rep.* 154.

the taking of the purſe, wherefore he was found guilty only of larciny, and had his clergy. (*d*)

IV. As to the point of clergy in robbery.

The ſtatute of 23 *H.* 8. *cap.* 1. (*e*), and 5 & 6 *E.* 6. *cap.* 9. do not ouſt robbery of clergy in all caſes, but only in two, *viz.* when the robbery is committed in a manſion-houſe, the owner, his wife, children or ſervants being in the houſe and put in fear (*f*), or when committed in or near the highway.

And therefore *Trin.* 38 *H.* 8. *Moore, n.* 16. *p.* 5. A man indicted of robbery *in quâdam viâ regiâ pedeſtri ducent' de* London *ad* Iſlington, and accordingly found guilty, had his clergy, for the words of the ſtatute are *for robbery in or near the highway he ſhall be ouſted of his clergy*, and therefore the indictment and conviction muſt be of a robbery *in vel prope altam viam regiam*, and it is not ſufficient to ſay only *viâ regiâ* or *viâ regiâ pedeſtri.*

For where any perſon is to be ouſted of his clergy by virtue of any act of parliament, two things are always requiſite, 1. That the indictment bring the fact within the ſtatute, but need not conclude *contra formam ſtatuti.*

2. That the evidence and finding of the jury likewiſe bring the caſe within the ſtatute, otherwiſe the priſoner is to have his clergy.

But an indictment of a robbery *in vel prope altam viam regiam*, tho in the disjunctive is uſual at *Newgate*, for if it be either in or near it, tho an indictment ought to be certain, yet this is not the ſubſtance of the indictment, nor that which makes the crime, but only to aſcertain the court as to the point of clergy to ſerve the ſtatute.

A rob-

(*d*) But it ſhould ſeem, that this was a private ſtealing from the perſon of another, and therefore, if above the value of twelve-pence, would have been ouſted of clergy by 8 *Eliz. cap.* 4. if the indictment had been laid purſuant to that ſtatute.

(*e*) This ſtatute, and that of 23 *H.* 8. *cap.* 3. ouſts clergy only in caſes of conviction, ſtanding mute, not directly anſwering, or challenging peremptorily above the number of twenty, but does not extend to the caſe of an outlawry, but this ſeems to be included in the word *attainted* in 1 *R.* 6. *cap.* 12. however it is expreſly provided for by 5 & 4 *W.* & *M. cap.* 9.

(*f*) Being put in fear is neceſſary by the 23 *H.* 8. *cap.* 1. (and alſo by 1 *E.* 6. *cap.* 12. which perhaps is the ſtatute intended by our author) but by 5 & 6 *E.* 6. *cap.* 9. all that is requiſite is, that the owner, &c. be in the houſe, tho not put in fear, for the expreſſion of that ſtatute is, *the owner*, &c. *being in the houſe, whether ſleeping or waking.*

A robbery is committed upon the *Thames* in a ſhip there lying at anchor below the bridge, on that ſide of the river, which is *Middleſex*, for this robbery *Hyde* and others were indicted as of a robbery done *in vel prope altam viam regiam*, and were ouſted of their clergy, for the *Thames* is in truth *alta via regia* the king's high ſtream, and if it were not, yet it is not far off from it, and the ſtatute ſays *near* not *next*.

By the ſtatute of 25 *H.* 8. *cap.* 3. (*g*) clergy is ouſted upon examination, if the original offenſe were committed in another county, and excluded from clergy by 23 *H.* 8. *cap.* 1. and that ſtatute extends to robbery in a manſion-houſe, or in or near the highway.

A. robs *B.* on the highway in the county of *C.* of goods to the value only of twelve-pence, and carries them into the county of *D.* it is certain, that this is larciny in the county of *D.* as well as in the county of *C.* but it is only robbery in the county of *C.* where the firſt taking was, and for robbery he cannot be indicted or appeald in the county of *D.* but only in the county of *C.* but he may be indicted of larciny in the county of *D.* and it is certain, tho the robbery were but of the value of one penny, yet if *A.* were indicted thereof in the county of *C.* he ſhould have had judgment of death, and been excluded from clergy.

Yet if *A.* be indicted of larciny in the county of *D.* and the jury find the value to be only twelve-pence, he ſhall only have the judgment of petit larciny, and not ſuffer death, as he ſhould have done, if he had been indicted of robbery in the county of *C.* altho it appear upon examination upon the trial in the county of *D.* that it was a robbery; the like law is, if it had been a robbery in a dwelling-houſe within the ſtatute of 23 *H.* 8. becauſe it can be no more than petit larciny in the county of *D.* it being found but of the value of twelve-pence, and accordingly reſolved by the opinion of all the juſtices, 31 *Eliz. Moore*, *n.* 739. *pag.* 550. for the ſtatute of 25 *H.* 8. extended to ouſt them of clergy, where clergy is demandable, but the jury finding the value to be but twelve-pence, or under,

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(*g*) This ſtatute was in effect repeald by 1 *E.* 6. *cap.* 12. but is revived by 5 & 6 *E.* 6. *cap.* 10.

der, no clergy is demandable, becauſe petit larciny, but the party is to be whipt only.

It hath been before obſerved, *cap.* 44. that upon the ſtatute of 39 *Eliz. cap.* 15. tho *A.* and *B.* be both preſent and conſenting to the breaking and entring of a houſe to rob, and *A.* only enters into the houſe, and *B.* ſtands by, *A.* ſhall be ouſted of his clergy, but *B.* ſhall have his clergy (*b*), becauſe *A.* only entred the houſe, and the words of the ſtatute extend only to him, that actually enters the houſe, yet if *A.* and *B.* be preſent, and conſenting to a robbery in or near the highway, or to a burglary, tho *A.* only actually commits the robbery, or actually breaks and enters the houſe, and *B.* perchance be watching at another place near, or be about a robbery hard by, which he effects not, yet they are both robbers or burglars, and both ſhall be ouſted of their clergy, as in *Pudſey's* caſe, and the reaſon of the difference is, becauſe in this caſe both are robbers and burglars, but in the former caſe both ſteal not in the houſe, but only *A.* and that ſtatute binds up the excluſion of the clergy to ſtealing in the houſe.

Anno 1672. at *Newgate*, *Hyde* and *A. B. C.* and *D.* conclude to ride out to rob, and accordingly they rode out, but at *Hounſlow D.* parted from the company, and rode away to *Colbrook*, *Hyde*, *A. B.* and *C.* rode towards *Egham*, and about three miles from *Hounſlow*, *Hyde*, *A.* and *B.* aſſaulted a man, but before he was robbed *C.* ſeeing another man coming at a diſtance before the aſſault rode up to him about a bow-ſhot or more from the reſt, intending either to rob him, or to prevent his coming to aſſiſt, and in his abſence *Hyde*, *A.* and *B.* robbed the firſt man of divers ſilk ſtockings, and then rode back to *C.* and they all went to *London*, and there divided the ſpoil: it was ruled upon good advice, 1. That *D.* was not guilty of the robbery, tho he rode out with them upon the ſame deſign, becauſe he left them at *Hounſlow*, and fell not in with them, it may be he repented of the deſign, but at leaſt he purſued it not. 2. That *C.* tho he was not actu-

(*b*) But now by the ſtatute of 3 & 4 *W. & M. cap.* 9. he would not have his clergy, for by that ſtatute clergy is taken away from all aiders, abetters, or aſſiſters.

ally preſent at the robbery, nor, as I remember, at the aſſault, but rode back to ſecure his company, was guilty as well as *Hyde*, *A.* and *B.* and thereupon *C.* as well as *Hyde*, *A.* and *B.* had judgment of death, and was excluded of clergy, the indictment being for robbery on the highway, according to the reſolution in *Pudſey*'s caſe, for they were all robbers on the highway.

CHAP. XLVII.

Concerning reſtitution of goods *ſtolen, and the* confiſcation of goods *omitted in the indictment or appeal.*

ALtho this title may ſeem to come more properly to be examined, when we come to conſider of the proceedings and judgment in criminal cauſes, yet in as much as it properly relates to larciny and robbery of goods, it will not be amiſs to take it up here as an appendix to the four former chapters touching larciny and robbery.

There are three means of reſtitution of goods for the party, from whom they were ſtolen, *viz.* 1. By appeal of robbery or larciny. 2. By the ſtatute of 21 *H.* 8. *cap.* 11. And 3. By courſe of common law.

I. Upon an appeal of robbery or larciny, if the party were convict thereupon, reſtitution of the goods contained in the appeal was to be made to the appellant, for it is one of the ends of that ſuit.

And hence it is, that if in an appeal of felony or robbery the appellant omit any of the goods ſtolen from him, they are forfeit, and confiſcate to the king. 45 *E.* 3. *Coron.* 100.

And ſo it is, if he bring an appeal of robbery or larciny, and it appear upon the trial, that indeed the goods were the plaintiff's, but yet the appellee came to the goods not by felony, but by finding or bailment or the like without felony, the plaintiff forfeits theſe goods to the king for his falſe appeal. 3 *E.* 3. *Coron.* 367.

But if the defendant in the appeal be convicted, he ſhall not only have judgment of death, but the plaintiff ſhall have a reſtitution of his goods.

If *A.* ſteal the goods of *B. C.* and *D.* ſeverally, and *B.* brings his appeal, and convicts the offender, yet before judgment *C.* and *D.* may purſue their appeals, and he ſhall be arraigned alſo upon their ſeveral appeals. 4 *E.* 4. 11. *a.*

So if judgment be given againſt *A.* upon the appeal of *B.* yet if the appeal of *C.* were begun before the attainder, *A.* ſhall be arraigned upon the appeal of *C.* becauſe he is to have reſtitution of his goods thereby, yet by the book of 7 *H.* 4. 31. and 12 *E.* 2. *Coron.* 379. it ſeems, that the ſecond trial at the ſuit of *C.* is but in nature of an inqueſt of office to entitle him to the reſtitution of his goods, becauſe as to the judgment of life he is already in law a dead perſon, and the book of 4 *E.* 4. 11. (*a*) ſpeaks not in caſe of a judgment, but only of a conviction or finding guilty; *quere*, *vide* 44 *E.* 3. 44. yet *vide Stamf. p.* 66 and 107. it ſeems the attainder is no bar to *C.*

But certain it is, that if *A.* be attaint at the ſuit of *B.* and then and not before *C.* commence his appeal, *A.* ſhall not be arraigned thereupon, but if he be afterwards pardoned, then he ſhall be arraigned at the ſuit of *C.* commenced after the attainder, 6 *H.* 4. 6. *b.* 10 *H.* 4. *Coron.* 227. But if the attainder were at the king's ſuit for that very felony, for which *C.* brought his appeal after the attainder, then it ſeems he ſhall not be put to anſwer it. *Stamf. P. C. p.* 106.

Now touching reſtitutions upon appeals, *Stamf. Lib.* III. *cap.* 10. *fol.* 165. hath given us a full account, I ſhall follow his method partly and ſummarily. 1. Where the plaintiff ſhall have reſtitution. 2. When. 3. Of what things.

1. As

(*a*) That caſe was of a ſecond appeal brought before the party had pleaded to the firſt.

1. As to the *firſt*, where and in what caſes the party appellant ſhall have reſtitution.

1. It muſt be upon freſh ſuit, and tho antiently the law was ſtrict herein as to the time and manner of the purſuit and apprehending of the felon, yet the law is now more liberal.

If the felon be taken by any others, as by the ſheriff, yet if the party robbed come within a year after, and give notice of the felony, and enter his appeal, this is a freſh ſuit, if he uſed his diligence ſhortly after the felony to have taken him. 7 *H.* 4. 43. *b.*

2. The appellant muſt proceed with his appeal to convict the felon; but yet in caſes of impoſſibility of ſuch conviction it is ſufficient that he uſed his endeavour; as if he take the felon, and impriſon him, and he dies within the year, and before the appeal commenced; ſo if the party abjure or break priſon after he is taken, 12 *E.* 2. *Coron.* 380. ſo as the appeal be commenced within the year and day, and that he made freſh ſuit, 26 *Aſſiz.* 32. or if he challenge peremptorily above the number appointed by law, ſtands mute of malice, or hath his clergy (*b*), 8 *H.* 4. 1. or be outlawed.

2. As to the *ſecond*, when he ſhall have reſtitution.

He ſhall have reſtitution after judgment againſt the appellee, and before execution made or prayed. 21 *E.* 4. 73. *b.*

He ſhall have reſtitution after conviction of the principal, and before conviction of the acceſſary, and after conviction of one of the principals before conviction of the other, or tho the other be acquitted upon his appeal. 21 *E.* 4. 16. *a.* 10 *H.* 4. *Coron.* 466.

But if *A.* ſteal ſeverally the goods of *B.* and *C.* and he be convict upon the appeal of *B.* yet *C.* ſhall not have reſtitution till he be convict at his ſuit alſo, 4 *E.* 4. 11. *ſupra.* altho the felon be convict at the ſuit of the appellant, yet he is not to have reſtitution till the freſh ſuit be inquired, which is to be done by the ſame jury, that convicts the felon, if he plead to inqueſt, but if he confeſs the felony, or ſtand mute,

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(*b*) 4 *E.* 4. 19. *b.*

it ſhall be inquired by inqueſt taken *ex officio* by the judge. 1 *H.* 4. 5. *a.* 2 *R.* 3. 12. 3 *H.* 7. 12. *b.*

3. Of what things he is to have reſtitution.

If a felon waive the goods ſtolen without any purſuit after him, thoſe goods are not in law *bona waiviata*, nor forfeit to the king or lord of a franchiſe; but if he waive them upon a purſuit of him, then they are *bona waiviata*, and forfeit to the king or lord of the liberty; *quod vide* 5 *Co. Rep.* 109. *a. Foxley*'s caſe.

And this forfeiture is not like a ſtray, where tho the lord may ſeize, yet the party, who is the owner, may retake them within the year and day, but here the true owner cannot ſeize his own goods, tho upon freſh ſuit within the year and day. 8 *E.* 3. 11. *a. Avowry* 151. 3 *E.* 3. *Cor.* 162.

But yet this is not an abſolute loſs of the owner's goods, but rather an expedient ſettled by law to drive the owner to convict the felon by proſecuting his appeal, and therefore if he make freſh ſuit, and proſecute his appeal, and the felon be thereupon convict or attaint, and the freſh ſuit be inquired and found by verdict or inqueſt of office, he ſhall have reſtitution of the goods ſo waived. 5 *Co. Rep.* 109. *Foxley*'s caſe, 3 *E.* 3. *Coron.* 162.

But more of reſtitution under the next general, for it is regularly true, that of what things the owner ſhall have reſtitution upon the ſtatute of 21 *H.* 8. he ſhould have reſtitution upon a conviction in an appeal at common law, and *è converſo*, ſo that what is ſaid upon that ſtatute, is applicable to reſtitution upon an appeal.

II. By the ſtatute of 21 *H.* 8. *cap.* 11. it is enacted, "That "if any perſon do rob or take away the goods of any of "the king's ſubjects within this realm, and be indicted, ar- "raigned, and found guilty thereof, or otherwiſe attainted "by reaſon of the evidence of the party ſo robbed, or owner "of the ſaid money, goods or chattels, or any other by their "procurement, that then the party ſo robbed, or owner, "ſhall be reſtored to his money, goods or chattels, and the "juſtices, before whom ſuch perſon ſhall be ſo attainted, or "found guilty by reaſon of the evidence of the party ſo

" robbed, or owner, or by any other by their procurement, " have power to award writs of reſtitution for the ſaid mo- " ney or goods, or chattels in like manner, as tho any ſuch " felon or felons were attainted at the ſuit of the party in an " appeal.

This ſtatute introduced a new law for reſtitution, for before this ſtatute there was no reſtitution upon an indictment, but only upon an appeal. 22 *E.* 3. *Coron.* 460. *Stamf. P. C. p.* 167. *a.*

Tho the ſtatute ſpeak of the king's ſubjects, it extends to aliens robbed, for tho they are not the king's natural-born ſubjects, they are the king's ſubjects, when in *England*, by a local alligeance.

If the ſervant be robbed of the maſter's money, and the maſter, or his ſervant by his procurement give evidence and convict the felon, the maſter ſhall have a writ of reſtitution, if it appear upon the indictment and evidence, it was the maſter's money, for the ſtatute gives reſtitution to the party robbed or owner. *Stamf. P. C. p.* 167.

If *A.* be robbed by *B.* and *C.* and *B.* only is convict of the robbery by the evidence of *A.* he ſhall have reſtitution, for ſo he ſhould have had in caſe of an appeal.

If *A.* be robbed of an ox by *B.* who ſells him to *C.* who keeps the money in his hands, and after kills the ox, and ſells the fleſh, or if the money be ſeized in the hands of the thief, *A.* may, if he pleaſe, have a writ of reſtitution for the money. *Noy*'s reports, *Harris*'s caſe. (*c*)

So if money be ſtolen, and the thief taken, and the money ſeized, he ſhall have reſtitution of the money.

The teſtator is robbed, the thief is convict upon the procurement of the executor, he ſhall have reſtitution. 3 *Eliz. Benl.* 87. *Dy.* 201. 6 *Co. Rep.* 80.

It hath been a great queſtion, if goods be ſtolen, and by the thief ſold in a market-overt, whether the thief being convicted upon the evidence of the party robbed, he ſhall have reſtitution upon this ſtatute of the thing ſold or not, the buyer not being privy to the felony: thoſe that held he

I ſhould

(*c*) *Noy* 128.

ſhould not, ground themſelves upon the book of 12 *H.* 8. 10. Mr. *Dalton*'s opinion, *cap.* 111. *p.* 299. (*d*) upon the reſolution in the caſe of *market-overt*, 5 *Co. Rep.* 83. *b.* which was upon occaſion of a writ of reſtitution (*e*), where it is held, that the ſale in market-overt is a bar to the reſtitution, and upon the ſtatute of 31 *Eliz. cap.* 12. where it is ſpecially provided, that notwithſtanding a ſale of a horſe in market-overt the owner may take him within ſix months after the felony upon proof of his property, which evidenceth, that after the ſix months he ſhall not have reſtitution; and of this opinion was *Hyde* juſtice (*f*) at the ſeſſions held after *Trin.* 13 *Car. Brown* juſtice *diſſentiente.*

But it ſeems he ſhall have reſtitution upon this ſtatute, notwithſtanding the ſale in market-overt of the goods ſtolen, and as to the authorities, the 12 *H.* 8. 10. was before the ſtatute of 21 *H.* 8. and Mr. *Dalton*'s opinion ſeems to be grounded upon it; the caſe of *market-overt*, 5 *Co. Rep.* it is true ſeems to be againſt the reſtitution, tho the caſe fell off upon this, that the ſcrivener's ſhop was no market-overt by the cuſtom of *London.*

As to the ſtatute of 31 *Eliz.* to which I may add alſo the ſtatute of 1 *Jac. cap.* 21. that enacts, "No ſale of ſtolen goods "in *London*, *Weſtminſter* or *Southwark*, or within two miles to "a broker, ſhall make any change or alteration of the pro-"perty or intereſt:" Theſe ſtatutes make nothing as to the caſe in queſtion, for without queſtion the ſale in market-overt changeth the property in thoſe caſes, wherein theſe and the like ſtatutes have not enacted the contrary, and therefore the party cannot take them again from the buyer, unleſs in caſe of brokers, and ſtolen horſes, *ut ſupra:* but this comes not to the queſtion in hand, for here the act of parliament gives the reſtitution, and that only, where the felon is convicted; and this reſtitution is not prevented by the ſale in market-overt. 1. This act was made to incourage perſons robbed to purſue malefactors, and therefore they have an aſſurance of reſtitution, and it would be ſmall incouragement if

(*d*) *New Edit. cap.* 164. *p.* 543. (*e*) 1 *And.* 344. (*f*) *Kel.* 35.

if a thief by ſale in market-overt, which is every day in almoſt every ſhop in *London*, ſhould elude it.

2. It were againſt the common good, and would incourage offenders to the common detriment, if this ſale ſhould conclude the owner.

3. The man, that is robbed, is robbed againſt his will, and cannot help it, but the buyer of ſtolen goods may chuſe, whether he will buy, or if he buy, may yet refuſe to buy, unleſs well ſecured of the property of the goods, or knowing the owner.

And if it be ſaid, that the reſtitution ſhall be, as in caſe of an appeal, and a ſale in market-overt had barred a reſtitution in an appeal.

I anſwer, 1. That it is but *gratis dictum*, that a ſale in a market-overt had barred reſtitution in appeal, for there is no authority for it, but the only book, that I know in the caſe, is to the contrary, *viz.* 2 *Co. Inſtit. p.* 714. If *A.* commits a robbery, the king's officer ſeizeth the goods ſtolen, and ſells them in market-overt, the party robbed convicteth *A.* upon his appeal, he ſhall have reſtitution notwithſtanding ſuch ſale, if he made freſh ſuit. 2. But ſuppoſe the appellant ſhould not have reſtitution, yet that reſtrains not reſtitution in caſe of the ſtatute of 21 *H.* 8. for the words *As though he had been attaint in appeal* are not reſtrictive, but relative only to the manner of the writ of reſtitution, which ſhall be ſuch as in an appeal.

For authorities, 1. It hath been the conſtant practice at *Newgate*, that ſale in market-overt hath not been allowed againſt this writ of reſtitution, and this Mr. *Lee*, the ſecondary there for above thirty years, hath atteſted openly in the court there oftentimes before myſelf, and divers others (*g*): again, 2 *Co. Inſt. p.* 714. lord *Coke*'s opinion was in theſe words, *So that in this caſe alſo*, (*viz.* upon the ſtatute of 21 *H.* 8. *cap.* 11.) *the party robbed, or owner, ſhall have reſtitution notwithſtanding any ſale in market-overt*, and with this agreed myſelf and juſtice *Twiſden* upon conſideration of this ſtatute.

Upon

(*g*) See *Kel.* 48.

Upon this ſtatute of 21 *H.* 8. if the offender be convict upon the evidence of the party robbed, or owner, he ſhall have reſtitution, tho there were no freſh ſuit, or any inquiry by inqueſt touching the ſame, and this is conſtant practice, tho in caſe of an appeal it be otherwiſe.

If *A.* be robbed by *B.* of a ſilver cup, a piece of cloth, and other things, and *A.* prefers an indictment only for one of them, as namely the cloth, and convict the felon, he ſhall have reſtitution of no more than what is contained in the indictment, and the goods omitted are confiſcate to the king, as in caſe of goods omitted in an appeal, 44 *E.* 3. 44. (*b*) *tamen quære*, for it is not really the party's ſuit. *Vide Dalt. cap.* 111. *p.* 298. (*i*)

If *A.* have his goods ſtolen by *B.* and *A.* prefers a bill of indictment, which is found, whereupon *B.* flies and is outlawed, *A.* ſhall have reſtitution, for he gave evidence upon the indictment, which, tho it be not a conviction, is the ground of the outlawry, which is an attainder. *Dalt. ubi ſupra.*

A. and *B.* have their ſeveral goods ſtolen by *C. A.* prefers his bill of indictment for his goods, *C.* is thereupon convicted, notwithſtanding that conviction *B.* may prefer his bill, and *C.* ſhall be thereupon arraigned and tried to the end that *B.* may have his reſtitution, which he could not have by the conviction upon the indictment of *A.* becauſe a diſtinct felony, tho moſt uſually at the ſame ſeſſions the ſeveral indictments againſt the ſame perſon are tried by the ſame jury: *vide* 4 *E.* 4. 11. *Stamf. P. C. fol.* 167. *b.*

But ſuppoſe that *C.* be attaint on the indictment preferd by *A.* and reprieved till another ſeſſions, and then *B.* prefer a bill of indictment for another robbery upon him by *C.* in this caſe *C.* may plead to the country if he pleaſe, and upon conviction *B.* ſhall have reſtitution, for the court is not bound to take notice at another ſeſſions, that he is attaint, but he may if he pleaſe plead *autrefoits attaint*, and refuſe to anſwer, and then by the book of 44 *E.* 3. 44. in caſe of an appeal he ſhould have no reſtitution, but his goods ſhould be con-

 fiſcate

(*b*) This is more directly proved *Corone* 100. (*i*) *New Edit. ubi ſupra.*

fiſcate to the king, but I think that to ſerve the ſtatute of 21 *H.* 8. as to the point of reſtitution the court may and in reaſon ought to inquire by an inqueſt of office touching the robbery of *B.* and being aſcertained of it thereby to grant reſtitution, tho they ought to give no new judgment of death upon ſuch inqueſt, at leaſt, unleſs the priſoner had pleaded to the indictment not guilty, and put himſelf upon the country: *vide* 4 *E.* 4. 11. *Dalt. cap.* 111. *p.* 714, 715. (*k*), *Stamf. P. C. p.* 107.

And thus far of reſtitution by the ſtatute of 21 *H.* 8.

III. Reſtitution by courſe of law is either by taking his goods, or by action.

1. As to retaking of goods ſtolen: if *A.* ſteal the goods of *B.* and *B.* take his goods of *A.* again to the intent to favour him or maintain him, this is unlawful and puniſhable by fine and impriſonment (*l*), but if he take them again without any ſuch intent, it is no offenſe, *Mich.* 16 *Jac. B. R. Higgins* and *Andrews* (*m*), but juſtifiable.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them, becauſe he hath purſued the law upon him, and may have his writ of reſtitution, if he pleaſe.

2. By courſe of common law: *A.* ſteals the goods of *B. viz.* fifty pounds in money, *A.* is convicted, and hath his clergy upon the proſecution of *B. B.* brings a *trover* and converſion for this fifty pounds, and upon not guilty pleaded this ſpecial matter is found, and adjudged for the plaintiff, becauſe now the party hath proſecuted the law againſt him, and no miſchief to the common-wealth; but it was held, that if a man felonioufly ſteal goods, and before proſecution by indictment the party robbed brings *trover*, it lies not, for ſo felonies ſhould be healed. *M.* 1652. *B. R. Dawkes* and *Coveneigh* (*n*); *vide accordant Noy*'s reports (*o*), *Markham* and *Cob*, but if the

2 plaintiff

(*k*) *New Edit. cap.* 164. *p.* 543.

(*l*) And ſo ſeems the practice of advertiſing a reward for bringing goods ſtolen, and no queſtions asked, which I have heard lord chancellor *Macclesfield* declare to be highly criminal, as being a ſort of compounding of felony, for the goods by that means returning to the right owner, a ſtop is put to the inquiry and proſecution of the felon, and thereby great encouragement is given to the commiſſion of ſuch offenſes. See *poſtea cap.* 56.

(*m*) 2 *Rol. Rep.* 55.

(*n*) *Style* 346.

(*o*) *Noy* 82.

plaintiff had not given evidence upon the conviction, it was held, that the action lay not, but the goods were confiſcate to the king, and for want of that averment in the caſe of *Markham* judgment was given for the defendant in treſpaſs.

CHAP. XLVIII.

Of burglary, *the kinds, and puniſhment.*

I Come to thoſe crimes, that ſpecially concern the habitation of a man, to which the laws of this kingdom have a ſpecial reſpect, becauſe every man by the law hath a ſpecial protection in reference to his houſe and dwelling. (*a*)

And that is the reaſon, that a man may aſſemble people together for the ſafeguard of his houſe, which he could not do in relation to travel, or a journey. 21 *H.* 7. 39. *a.*

And upon the ſame reaſon it is, that not only by the ſtatute of 24 *H.* 8. *cap.* 5. but even by the common law, if any come to commit a felony upon me in my houſe, and I kill him, it is no felony, nor induceth any forfeiture; *quod vide ſupra p.* 487. *vide* Sir *Henry Spelman Gloſſ.* tit. *Hamſecken, & ibidem* tit. *Burglaria,* whereby it appears, that by the antient laws of *Canutus* (*b*), and of *H.* 1. (*c*), it was puniſhed with death.

The common genus of offenſes, that comes under the name of *Hamſecken*, is that which is uſually called houſe-breaking, which ſometimes comes under the common appellation of *burglary*, whether committed in the day or night to

(*a*) That this was the notion among the *Romans* alſo appears from *Cicero in oratione pro domo*, cap. 41. *Quid enim ſanctius, quid omni religione munitius, quam domus uniuſcujuſque civium? Hic aræ ſunt, hic foci,——hoc perſugium eſt ita ſanctum omnibus, ut inde abripi neminem fas ſit.*

(*b*) *l.* 61. reckons *irruptio in domum* among the *ſcelera inexpiabilia.*

(*c*) *l.* 80. See *Wilk. Leg. Anglo-Sax. p.* 273.

to the intent to commit felony, ſo that houſe-breaking of this kind is of two natures.

1. That which in a vulgar and improper acceptation is ſometimes called burglary, and

2. That which in a ſtrict and legal acceptation is ſo called.

I. As to the former of theſe, *hamſecken*, houſe-breaking, or burglary in a vulgar acceptation is of ſeveral kinds.

1. Robbing of any perſon by day or night in his dwelling-houſe, the dweller, his wife, children or ſervants being in the houſe, and put in fear; this requires that there be ſome thing taken, but it requires not an actual breach of the houſe, but it is all one, whether he actually breaks the houſe, or enters *per oſtia aperta*, for it is in truth robbery either way, and from this offenſe clergy is taken away by the ſtatute of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. from the principal, and by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. from the acceſſary.

2. Robbing a perſon by day or night in his dwelling-houſe, the dweller, his wife or children being in the houſe and not put in fear; this requires, 1. An actual breaking of the houſe. 2. An actual taking of ſomething, but the perſons need not be put in fear, and by the ſtatute of 5 & 6 *E.* 6. *cap.* 9. clergy is in this caſe taken from the principal, that enters the houſe, and by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. from the acceſſary before.

3. Robbing a dwelling-houſe by day or night, and taking away goods, none being in the houſe; this requires an actual breaking, and an actual taking of ſomething, and without the latter it is not felony, but if accompanied with both, and the taking of goods be of the value of five ſhillings, it is excluded from clergy by 39 *Eliz. cap.* 15.

4. A breaking of the houſe in the day or night to the intent to ſteal or commit a felony, any perſon being in the houſe and put in fear, tho nothing be actually taken; this is burglary by the common law, if it is in the night, and felony by the ſtatute of 1 *E.* 6. *cap.* 12. tho in the day, and is excluded from clergy by the ſtatute of 1 *E.* 6. whether by day or by night, but then it requires, 1. An actual breaking of the houſe, and not an entry *per oſtia aperta.* 2. An entry with

intent to commit a felony, and ſo laid in the indictment. *Poulter's* caſe, 11 *Co. Rep.* 31. *b.*

3. A putting in fear, but acceſſaries have clergy.

II. Legal or proper burglary is of two kinds, *viz.* 1. Complicated and mixed with another felony, as breaking the houſe, and ſtealing goods, either with putting in fear or without putting in fear, ſomebody in the houſe, or nobody in the houſe, which requires, 1. That it be done in the night. 2. That there be an actual breaking.

2. Simple burglary, and that either, 1. With putting in fear, and then the principal is excluded of clergy by the ſtatute of 1 *E.* 6. and alſo by the ſtatute of 18 *Eliz.* or 2. Without putting in fear, and then he is excluded of clergy by the ſtatute of 18 *Eliz.*

And this chapter ſpeaks only of proper or legal burglaries, of thoſe improper burglaries I have ſpoken before.

Burglary is deſcribed by Sir *Henry Spelman* (*e*) to be *nocturna diruptio alicujus habitaculi vel eccleſiæ, etiam murorum portarumve civitatis aut burgi ad feloniam perpetrandam.*

My lord *Coke P. C. cap.* 14. *p.* 63. more fully deſcribes it. " A burglar is he, that in the night-time breaketh and en-" treth into a manſion-houſe of another of intent to kill " ſome reaſonable creature, or to commit ſome other fe-" lony within the ſame, whether his felonious intent be exe-" cuted or not.

And accordingly the indictment runs, *quod* J. S. 1 *die* Julii *anno &c. in nocte ejuſdem diei vi & armis domum manſionalem* A. B. *felonicè & burglariter fregit & intravit, ac ad tunc & ibidem unum ſcyphum argenteum &c. de bonis & catallis ejuſdem* A. B. *in eadem domo invent' felonicè & burglariter furatus fuit, cepit & aſportavit*; or if no theft were actually committed, then *ex intentione ad bona & catalla ejuſdem* A. B. *in eadem domo exiſtent' felonicè & burglariter furandum, capiendum & aſportandum*, or *eâ intentione ad ipſum* A. B. *ibidem felonicè interficiendum contra pacem &c.*

And note, that theſe ſeveral clauſes in the indictment are eſſential to the conſtitution of burglary, 1. That it be ſaid *noctanter*, or in *nocte ejuſdem diei* (*f*), for if it be in the day-

(*e*) *in verbo* burglaria. (*f*) See 9 *Co.* 66. *b.*

time, it is not burglary. 2. That it be ſaid in the indictment *burglariter*, for it is a legal word of art, without which burglary cannot be expreſſed with any kind of other word or other circumlocution, and therefore, where the indictment is *burgaliter* inſtead of *burglariter*, it makes no indictment of burglary, ſo if it be *burgenter*. 4 *Co. Rep.* 39. *b.* (*g*)

3. It muſt be *fregit & intravit*, for it is held, that breaking without entring, or entring without breaking makes not burglary, *ſed de hoc infra*; yet *Trin.* 5 *Jac. B. R.* an indictment, *quod felonicè & burglariter fregit domum manſionalem, &c.* was a good indictment of burglary, and that the entry is ſufficiently implied, even in an indictment, by the words *burglariter fregit*, but the ſafeſt and common way is to ſay *fregit & intravit*.

4. It muſt be ſaid *domum manſionalem*, where burglary is committed in a houſe, and not generally *domum*, for that is too uncertain, and at large.

5. It muſt be alleged, that he committed a felony in the ſame houſe, or that he brake and entred the houſe to the intent to commit a felony, but theſe things will be fuller examined, when we come to particulars.

1. Therefore the time, wherein it muſt be committed to make it burglary, muſt be in the night.

It hath been antiently held, that after ſun-ſet, tho day-light be not quite gone, or before ſun-riſing is *noctanter* to make a burglary, *Dalt. cap.* 99. *p.* 352. (*b*), and accordingly cited by *Crompt. fol.* 32. *b.* to have been judged by *Portman*, 3 *E.* 6. (*i*), and the felons executed, and 21 *H.* 7. *Kelw.* 75. *a.*

But the latter opinion hath been and ſtill obtaineth, that if the ſun be ſet, yet if the countenance of a party can be reaſonably diſcerned by the light of the ſun or *crepuſculum*, it is not night, nor *noctanter* to make a burglary, and with this agrees *Co. P. C. p.* 63. and hence it is, that altho a town unwalled ſhall not be amerced for the eſcape of a murderer, if the murder were committed in the night, yet if it were done only *in veſpere diei*, the townſhip ſhall be amerced. 3 *E.* 3. *Coron.* 293.

4

(*g*) See alſo 5 *Co.* 121. *b.*
(*b*) *New Edit. cap.* 151. *p.* 486.
(*i*) See the like judgment *per Finux*, *Crompt.* 33. *a.*

Coron. 293. And if a robbery be committed before ſun-riſing, or after ſun-ſet, and whilſt it is ſo far day-light, that the countenance of a man can be reaſonably diſcerned by the light of the day, yet the hundred ſhall be charged, otherwiſe where it is done in the night, 7 *Co. Rep.* 34. *Millard's* caſe: but this is not intended of moon-light, for then midnight houſe-breaking ſhould be no burglary; and the word *noctanter* is to be applied to all that follows, *viz. fregit & intravit*, if the breaking of the houſe were in the day-time, and the entring in the night, or the breaking in the night, and entring in the day, this will not be burglary, for both make the offenſe, and both muſt be *noctanter: vide Cromp.* 33. *a. ex* 8 *E.* 2. (*k*)

But if they break a hole in the houſe one night to the intent to enter another night and commit felony, and accordingly they come at another night, and commit a felony through the hole they ſo made the night before, this ſeems to be burglary, for the breaking and entring were both *noctanter*, tho not the ſame night; and it ſhall be ſuppoſed, that they brake and entred the night when they entred, for the breaking makes not the burglary till the entry.

2. There muſt be a breaking and an entry to make the burglary, and therefore I ſhall ſpeak of them both together.

Antiently the law was ſo ſtrict againſt burglary, that the very coming to a houſe with intent to commit a burglary was held puniſhable with death, *Cromp.* 31. by Sir *Anthony Brown*; but that obtains not now for law without a burglary committed.

Fregit, there is a double kind of breaking, 1. In law, and thus every one, that enters into another's houſe againſt his will, or to commit a felony, tho the doors be open, doth in law break the houſe. 2. There is a breaking in fact an actual force upon the houſe, as by opening a door, breaking a window, *&c.*

And altho, in the remembrance of ſome yet alive, Sir *N. H.* (*l*) chief juſtice did hold, that a breaking in law was ſufficient to make a burglary, as if a man entred into the houſe

(*k*) This caſe does not fully prove the point it is brought for, for the reſolution there was only, that if thieves enter in by night at an hole in the wall, which was there before, it is not burglary, but it does not appear who made the hole.

(*l*) Sir *Nicholas Hide*, ſee *Cro. Car.* 65, 225.

houſe by the doors open in the night, and ſtole goods, that this is burglary, and accordingly is *Crompt.* 32. *a.* 27 *Aſſiz.* 38. yet the law is, that a bare breaking in law, *viz.* an entry by the doors or windows open is not ſufficient to make burglary without an actual breaking, *Co. P. C. p.* 64. and ſo the law hath been generally taken to this day in caſe of burglary. (*m*)

And theſe acts amount to an actual breaking, *viz.* opening the caſement, or breaking the glaſs window, picking open a lock of a door with a falſe key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger, *Dalt. cap.* 99. (*n*). *Crompt.* 33. *a.* and ſo is common experience.

To take down a pane of glaſs of a glaſs-window by taking out or bending aſide the nails that faſten it is a breaking of a houſe within this law, becauſe the glaſs-window is parcel of the houſe.

It was held by *Manwood* chief baron, that if a thief goes down a chimney to ſteal, this is a breaking and entring, *Crompt. fol.* 32. *b.* and hereunto agrees Mr. *Dalton, p.* 253. (*o*)

There was one arraigned before me at *Cambridge* for burglary, and upon the evidence it appeard, that he crept down a chimney; I was doubtful, whether this were burglary, and ſo were ſome others, but upon examination it appeard, that in his creeping down ſome of the bricks of the chimney were looſened, and fell down in the room, which put it out of queſtion, and direction was given to find it burglary; but the jury acquitted him of the whole fact.

In ſome caſes there may be a burglary committed by a man without an actual breaking.

Thieves come with a pretended hue and cry, and require the conſtable to go along with them to ſearch for felons, and whilſt he goes with them into a man's houſe, they bind the conſtable and dweller, and rob him, this is burglary (*p*), *Co. P. C. p.* 64. The like happend in *Black Fryars* 1664. where

4 thieves

(*m*) See *Kel.* 67 & 70.

(*n*) *New Edit. p.* 487.

(*o*) The reaſon of this ſeems to be, becauſe it is as much ſhut, as the nature of the thing will admit.

(*p*) Becauſe *in fraudem legis*; for the ſame reaſon it is burglary, where the thieves gain entrance by pretenſes of buſineſs with one in the houſe, *Kel.* 42. or of executing any proceſs, or the like, *Kel.* 43, 44, 62, 82.

thieves pretending that *A.* harboured traitors called the conſtable to go with them to apprehend him, and the conſtable entring they bound the conſtable, and robbed *A.* and were executed for burglary, and yet in both caſes the owner opend the doors of his own accord, at the command of the conſtable. *Cromp.* 32. *b.*

Thieves come in the night to rob *A.* who perceiving it opens his door, and iſſues out and ſtrikes one of the thieves with a ſtaff, another thief having a piſtol in his hand, perceiving others in the entry ready to interrupt them, puts his piſtol within the door over the threſhold, and ſhot, ſo that his hand was over the threſhold, but neither his foot, nor the reſt of his body, and upon this evidence by great advice it was adjudged burglary, and the thief hanged, and yet he brake not the houſe. 26 *Eliz. Cromp.* 32. *a.*

If *A.* the ſervant of *B.* conſpire with *C.* to let him in to rob *B.* and accordingly *A.* in the night-time opens the door or window, and lets him in, this is burglary in *C.* but larciny in *A.* the ſervant, *Dalt. cap.* 99. *p.* 253. (*q*). it ſeems it is burglary in both, for if it be burglary in *C.* it muſt needs be ſo in *A.* becauſe he is preſent, and aiding to *C.* to commit this burglary.

If *A.* enter the houſe of *B.* in the night-time, the outward doors being open, or by an open window, and when he is within the houſe turns a key of a door of a chamber, or unlatcheth a chamber door to the intent to ſteal, this is burglary, tho the outward door were open, and ſo it was adjudged upon a ſpecial verdict before me at the ſeſſions at *Newgate* 1672. by advice of many judges then alſo preſent.

And ſo it is if a thief be lodged in an inn, and in the night he ſtealeth goods, and goeth away, or if he enter into the houſe ſecretly in the day-time, and there ſtayeth till night, and then ſteals goods and goes away, this is not burglary, *Dalt. ubi ſupra p.* 253. and *Cromp.* 34. *a.* but if in either of the caſes they had opened an inner chamber door and took the goods, it had been burglary, agreed 1672. (*r*)

(*q*) *New Edit. p.* 487. (*r*) *Kel.* 69.

The ſervant lies in one part of the houſe, the maſter in another, and the ſtair-foot door of the maſter's chamber is latched, the ſervant came in the night, and unlatched the ſtair-foot door, and went up into his maſter's chamber with a hatchet intending to kill him, and wounded him dangerouſly, but the maſter eſcaped (*s*). Upon this ſpecial matter found at *Wincheſter* aſſizes, by the advice of the greater number of the judges, *exceptis paucis* (*t*), it was adjudged burglary, and the offender was executed. *T.* 16 *Jac. Hutt. Rep.* the caſe of *Haydon* and *Edmunds.* (*u*)

If a man enter in the night-time by the doors open, with the intent to ſteal, and is purſued, whereby he opens another door to make his eſcape, this I think is not burglary againſt the opinion of *Dalt. p.* 253. (*x*) out of Sir *Francis Bacon*, for *fregit & exivit, non fregit & intravit.* (*y*)

If *A.* be a lodger in an inn, and he goes up to his chamber to bed, and the chamberlain puls to the door and latcheth it, or *A.* himſelf locks it, and in the night he riſeth, openeth his chamber door, ſteals goods in the houſe, and goes away, it may be a queſtion, whether this be burglary; it ſeems not, becauſe he had a kind of ſpecial intereſt in his chamber, and ſo the opening of his own door was no breaking of the innkeeper's houſe, for *A.* hath a ſpecial property in his chamber, but if he had opened the chamber of *B.* a lodger in the inn to ſteal his goods, this had been burglary.

And in that caſe of a lodger, tho he hath a ſpecial intereſt in the chamber, yet he being but a lodger, and in an inn, the burglary muſt be ſuppoſed of the manſion-houſe of the inn-keeper (*z*): *vide plus infra.*

If *A.* enter into the houſe of *B.* in the night, by the doors open, and breaks open a cheſt, and takes away goods without breaking open of an inner door, this is no burglary, becauſe the cheſt is no part of the houſe. (*a*) But

(*s*) In old times this would have been adjudged petit treaſon, for antiently where the intent was ſo apparent *voluntas reputabatur pro facto. Coron.* 383.

(*t*) They all concurred, except *Winch*, who doubted.

(*u*) *Hutt.* 20. *Kel.* 67.

(*x*) *New Edit. p.* 487.

(*y*) But now this doubt is ſettled by 12 *Ann. cap.* 7. whereby breaking to get out is put upon the ſame foot with breaking to get in.

(*z*) *Kel.* 83.

(*a*) *Kel.* 69. But it is a felony, for which the offender is ouſted of his clergy, by 3 & 4 *W. & M. cap.* 9.

But if he break open a ſtudy or counting-houſe, or ſhop within the houſe, this is burglary, tho none uſually lodge in the ſtudy, and the ſame law ſeems to be, if he break open a cupboard or counter fixed to the houſe (*b*); *quære.*

3. *Fregit & intravit.* There muſt be an entry as well as a breaking, and both muſt be in the night and with an intent to ſteal, otherwiſe it is no burglary.

A. intending to rob *B.* breaks a hole in his houſe, but enters not, *B.* for fear throws out his money to him, *A.* takes it and carries it away, this is certainly robbery, and ſome have held it burglary, tho *A.* never entred the houſe; and ſo it is reported to have been adjudged by *Saunders* chief baron. *Crompt.* 31. *b. tamen quære.* (*c*)

If *A.* breaks the houſe of *B.* in the night-time, with intent to ſteal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine to reach out goods, or puts a piſtol in at the window with an intent to kill, tho his hand be not within the window, this is burglary. *Co. P. C. p.* 64.

But if he ſhoot without the window, and the bullet comes in, this ſeems to be no entry to make burglary; *quære.*

A. B. and *C.* come in the night by conſent to break and enter the houſe of *D.* to commit a felony, *A.* only actually breaks and enters the houſe, and *B.* ſtands near the door, but actually enters not, *C.* ſtands at the lane's end, or orchard gate or field gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others, if help comes, this is burglary in them all, tho *A.* only actually brake and entred the houſe, and they all in law are principals and excluded from clergy by the ſtatute of 18 *Eliz. cap.* 7. and ſo it is in robbery, as hath been ſaid 11 *H.* 4. 13. *b. Crompt.* 32. *a. Co. P. C. p.* 64.

If *A.* being a man of full age take a child of ſeven or eight years old well inſtructed by him in this villainous art, as ſome ſuch there be, and the child goes in at the window, takes goods out, and delivers them to *A.* who carries them away,

(*b*) *Kel. ubi ſupra.*

(*c*) It was adjudged by *Mountague* chief juſtice *C. B.* and *Saunders* only related it.

away, this is burglary in *A.* tho the child, that made the entry, be not guilty by reaſon of his infancy.

So if the wife in the preſence of the huſband by his threats or coercion breaks and enters the houſe of *B.* in the night, this is burglary in the huſband, tho the wife, that is the immediate actor, is excuſed by the coercion of her huſband.

4. *Domum manſionalem:* what ſhall be ſo ſaid.

An indictment, *quod felonicè & burglariter fregit & intravit eccleſiam parochialem de* D. *ea intentione &c.* is a good indictment of burglary, for *eccleſia* is *domus manſionalis. Co. P. C. p.* 64. *Dy.* 99. *a.* (*d*)

If *A.* have a dwelling-houſe, and upon occaſion he and all his family are abſent a night or more, and in their abſence in the night a thief breaks and enters the houſe to commit felony, this is burglary. *Co. P. C. ubi ſupra.*

So if *A.* have two manſion-houſes, and is ſometimes with his family at one, and ſometimes at the other, the breach of one of them in the abſence of his family from thence is burglary (*e*). 4 *Co. Rep.* 40. *a.* 39 *Eliz. Dalt. cap.* 99. *p.* 254. (*f*)

If *A.* have a chamber in a college or inn of court, where he uſually lodgeth in term-time, and in his abſence in the vacation his chamber or ſtudy be broken open, *&c.* this is burglary, and the indictment ſhall ſuppoſe it *domus manſionalis A. Co. P. C. p.* 65. 14 *Car.* 1. *Audley*'s caſe before cited. (*g*)

So it is if *A.* hires a chamber in the houſe of *B.* for a certain time, wherein he lodgeth, and during the time contracted for it is broke open, *&c.* this is burglary, and the indictment ſhall ſuppoſe it to be *domum manſionalem* of *A.* (*h*)

4 But

(*d*) Lord *Coke* ſays it is the manſion-houſe of Almighty God, but this is only a quaint turn without any argument, and ſeems invented to ſuit his definition of burglary, *viz.* the breaking into a *manſion*-houſe, whereas it appears from *Spelman loco ſupra citato*, and 22 *Aſſiz.* 93. that it is not neceſſary to burglary, that a *manſion houſe* be broken, for the breaking of churches, the walls or the gates of the city is alſo burglary, and the word *manſionalis* is only applicable to one kind of burglary, *viz.* the breaking of a private houſe, in which caſe it muſt be a *dwelling*-houſe.

(*e*) Even tho he had never lodged in it, but was removing his goods there in order to lodge in it. *Kel.* 46.

(*f*) *New Edit. p.* 488. See alſo *Poph.* 52. *Mo.* 660.

(*g*) *Cro. Car.* 473. by the name of *Evans* and *Finch.*

(*h*) Chief juſtice *Kerling* was of a different opinion and thought, in ſuch caſe the

But if in the king's houſe at *Whitehall*, or in the great houſe of any nobleman; there be apartments or lodgings aſſigned to the jeweller, treaſurer, ſteward, chamberlain, *&c.* and any of theſe lodgings be broken up burglarily, the indictment muſt ſuppoſe it to be *domus manſionalis* of the king, or of him that is truly lord or proprietor of the houſe, for they have the uſe of the lodgings as ſervants only, and not as owners; *Hungate*'s caſe before cited. (*i*)

And ſo it is if *A.* comes to the inn of *B.* and there hath a chamber appointed for his lodging, and this chamber is broken up burglarily, it ſhall ſuppoſe it to be *domus manſionalis* of *B.* the inn-keeper, becauſe the intereſt is in him, and *A.* hath only the uſe of it for his lodging, without any certain intereſt.

A tent or booth in a fair or market is not ſuch a *domus manſionalis*, wherein burglary may be committed, but robbery therein committed, the owner, his wife or ſervants being therein, is ſpecially exempted from clergy by the ſtatute of 5 *&* 6 *E.* 6. *cap.* 9. before mentiond. *Co. P. C. p.* 64.

If *A.* have a ſhop parcel of his manſion-houſe, and it be broken open in the night, *&c.* it is a burglary, and the indictment ſhall ſuppoſe, that he brake and entred *domum manſionalem* of *A.* for it is parcel thereof.

But if *A.* let the ſhop to *B.* for a year, and *B.* holds it, and works or trades in it, but lodgeth in his own houſe at night, and this ſhop is broken open, *&c.* the indictment cannot be, that *domum manſionalem* of *A. fregit*, for it was ſevered by the leaſe during the time (*k*), but then whether he may be indicted for burglary, as in the *domus manſionalis* of *B?* and certainly it is agreed on all hands, if *B.* or his ſervant ſometimes lodge in the ſhop, it is burglary, and it ſhall be ſuppoſed *domus manſionalis* of *B.* and this is common experience.

the indictment ought to be laid for breaking *domum manſionalem* of *B.* for while there is but one entrance, it is but one dwelling houſe, tho there be ſeveral inmates, but otherwiſe it is, if a man divide ſome rooms from the reſt of the houſe, and make another door to thoſe rooms. *Kel.* 83, *&c. Comp.* 2.

(*i*) *p.* 522.

(*k*) *Kel.* 84.

But ſuppoſe he never lodge there, but only works or trades therein in the day-time, and he or his ſervants never lodge there at night, whether this be a burglary to break and enter this ſhop to commit a felony?

And certainly it was in this caſe antiently held burglary, *M.* 37 & 38 *Eliz. B. R. Cole*'s caſe (*m*), an indictment, *quod ſhopam cujuſdam* Ricardi *burglariter & felonicè fregit & intravit &c.* it was admitted for the matter by the court of king's bench to be good, but doubted, whether it was good, becauſe it was *cujuſdam Ricardi* without mentioning his ſirname, and with this alſo agrees my lord *Coke in terminis, Co. P. C. p.* 64. in theſe words: *But a ſhop, wherein any perſon doth converſe being parcel of a manſion-houſe or not parcel, is taken for a manſion-houſe.*

But *T.* 17 *Jac. Hutton*'s *Rep.* 33. it is ruled to be no burglary to break open ſuch a ſhop, and accordingly the practice hath always gone at *Newgate* ſeſſions ſince my time or obſervation, and to this day it is holden no burglary to break open ſuch a ſhop; but if the ſhop-keeper, or his ſervant, uſually or often lodge in the ſhop at night, it is then *domus manſionalis*, in which a burglary may be committed.

Domus manſionalis doth not only include the dwelling-houſe, but alſo the out-houſes, that are parcel thereof, as barn, ſtable, cow-houſes, dairy-houſes, if they are parcel of the meſſuage, tho they are not under the ſame roof, or joining contiguous to it, and therefore, if ſuch ſtable or out-houſe belonging to the dwelling-houſe be broken open in the night-time with intent to ſteal, it is burglary, and with this agrees *Co. P. C. p.* 64, 65. *Dalt. cap.* 99. *p.* 254, 255. where for breaking open a back-houſe of *Robert Caſtle*'s, eight or nine yards diſtant from the dwelling-houſe, only a pale reaching between them, two were arraigned and condemned for burglary, and ſo it was agreed by all the judges in the time of chief juſtice *Hyde* laſt 1665. and the law was accordingly, and the contrary practice in one much blamed; and altho it was ſaid by ſome, that it had not been ſo uſed, and that the ſtatute of 4 & 5 *P. & M. cap.* 4. diſtinguiſhed between a dwel-

Hale's P. C. 82. cont. & 1. Hawk. P. C. c. 38. §. 12.

Dalt. Juſt. c. 151. p. 362.

3 ling-houſe

(*m*) *Mo.* 466.

ling-houſe and a barn, yet at length all the judges agreed, that the felonious breaking of a barn, parcel of a meſſuage, to ſteal corn was burglary according to my lord *Coke ubi ſupra*, and with this agrees 2 *E.* 6. *B. Corone* 180.

But if the barn, or ſtable, or cow-houſe be no parcel of the meſſuage, as if a man take a leaſe of a dwelling-houſe from *A.* and of a barn from *B.* or if it be far remote from the dwelling-houſe, and not ſo near to it as to be reaſonably eſteemed parcel thereof; as if it ſtand a bowſhot off from the houſe, and not within or near the curtilage of the chief houſe, then the breaking of it is not burglary, for it is not *domus manſionalis*, nor any part thereof.

An indictment that *noctanter clauſum* or *curtilagium felonicè & burglariter fregit ad occidendum* or *furandum* is not good, and yet 22 *Aſſiz.* 95. burglary is defined *to break houſes, churches, walls, courts, or gates in time of peace.* (*n*)

So that by that book it ſhould ſeem, that if a man hath a wall about his houſe for its ſafeguard, and a thief in the night break the wall or the gate thereof, and finding the doors of the houſe open, he enters into the houſe, this is burglary, but otherwiſe it had been if he had come over the wall of the court, and found the door of the houſe open, then it had been no burglary.

5. To make up burglary it muſt not be only to break and enter a houſe in the night-time, but either a felony muſt be committed in the houſe, or it muſt be to the intent to commit a felony.

If the indictment be, *quod domum manſionalem* J. S. *felonicè & burglariter fregit & intravit, & ad tunc & ibidem* certain goods of *J. S. felonicè & burglariter furatus fuit, cepit & aſportavit*, the indictment compriſeth two offenſes, *viz.* burglary and felony, and therefore he may be acquitted of burglary, if the caſe be ſo upon the evidence, and found guilty only of the felony, and then he ſhall have his clergy.

Or

(*n*) This was antiently underſtood only of the walls or gates *of the city: vide* Spelman *in verbo burglaria*; if ſo, it will not ſupport our author's following concluſion, wherein he applies it to the wall of a private houſe.

Or he may be acquitted of the felony, but then *quære*, whether he can be found guilty of the burglary, becauſe tho where the indictment compriſeth burglary and felony the indictment is good, tho it be not ſuppoſed in the indictment, that it was *ea intentione ad bona furandum*, for the act of theft being charged at the ſame time, it is a ſufficient evidence of his intention, but when he is acquitted of the felony, then there being nothing expreſly charged in the indictment, that *burglariter fregit, &c. eâ intentione ad bona &c. felonicè furandum*, it ſtands ſingle as if the indictment had been of ſingle burglary, in which caſe the clauſe of *eâ intentione ad furandum &c.* had been neceſſary to complete a ſingle burglary.

It ſeems therefore neceſſary in ſuch caſe not only to charge him, that *in nocte & burglariter & felonicè domum &c. fregit & intravit, & bona &c. cepit*, but alſo farther to ſay *eâ intentione ad bona & catalla &c. in eâdem domo exiſtentia felonicè & burglariter furandum*, and to add alſo the particular felony, *& ad tunc & ibidem unum ſcyphum argenteum &c.* and then, tho he be acquitted of the felony, the reſt of the indictment ſtands good againſt him as a ſimple burglary, and he may be convicted of it, tho acquitted of the felony.

And I think that as the offenſes of burglary and felony may be joined in the ſame indictment, ſo three offenſes may be joined in the ſame indictment, and if he be acquit of the one, he may be convicted of the other two, and it may be of uſe to exclude a malefactor of his clergy, where the offenſe is great, as namely for burglary, for felony, and for felony upon the ſtatute of 5 & 6 E. 6. *cap.* 9. for there may be an offenſe againſt that ſtatute, which will exclude from clergy, and yet not amount to burglary; and the form of the indictment may run thus, *Quod* A. *prima die* Februarii *anno regni domini* Caroli *&c. in nocte ejuſdem diei vi & armis apud* B. *felonicè & burglariter domum manſionalem fregit & intravit eâ intentione ad bona & catalla ejuſdem* B. *in eâdem domo exiſtentia felonicè & burglariter furandum, capiendum & aſportandum, & ad tunc & ibidem vi & armis unum ſcyphum argenteum ejuſdem* B. *in eâdem domo exiſtentem felonicè & burglariter furatus fuit, cepit & aſportavit, ipſo* B. *ac uxore, liberis & famulis ſuis in eâdem domo tunc exiſtentibus, contra pacem, &c.* And

3

And *note*, that ſuch an indictment need not conclude *contra formam ſtatuti*, it is ſufficient that it brings the caſe ſo within the ſtatute, as to exclude clergy; and ſo upon the ſtatute of 23 *H.* 8. *cap.* 1.

And upon this indictment, if it fall out upon the evidence, that he is guilty of the burglary, but not guilty of the ſtealing, he may be convict of the burglary, and ſo ouſted of clergy, tho he be found not guilty of the felony: again, tho he be found not guilty of the burglary, becauſe it may be the breach of the houſe was in the day-time, the dweller, his wife or ſervants in the houſe, yet he may be found guilty of the felony within the qualifications containd in the indictment purſuant to the ſtatute of 5 & 6 *E.* 6. and ſo ouſted of his clergy, for that is not confined either to the day or night: again, if upon the evidence it appear not to be burglary, becauſe done in the day-time, nor yet felony ſo qualified as is excluded from clergy, becauſe either there was no act of breaking, or if there were, yet the dweller, his wife or ſervants were not in the houſe, he may be convict of common larciny, and ſo have benefit of clergy.

And ſo much for burglary joined with larciny.

Simple burglary is where the breaking and entring is *eâ intentione ad bona & catalla furandum*, or *ad interficiendum*, &c. and this clauſe, as it is uſually added in caſes of ſimple burglary, ſo it is neceſſary, and hereupon theſe things are obſervable.

1. That altho the breaking and entring be charged to be done *burglariter*, yet if the intention of that entry be either laid in the indictment, or appear upon the evidence to be to the intent only to commit a treſpaſs and not a felony, as *eâ intentione ad ipſum* A. *ad tunc & ibidem verberandum*, it is no burglary, but it muſt be laid and proved to be *eâ intentione* to ſteal or to kill, or to commit ſome other felony, for tho the killing or murder may be the conſequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary. *Co. P. C. p.* 65. 13 *H.* 4. 7. *b.*

2. That if a man in the night break and enter a houſe to the intent to commit a felony, tho he attain not that intent,

but take or ſteal nothing, this is burglary, and excluded from clergy. 22 *Aſſiz.* 39. & 95. *Dy.* 99. *Crompt.* 31. *a. Coron.* 264. *Stamf. P. C. p.* 30. *a. Co. P. C. p.* 63. and herein it differs from robbery.

3. It ſeems, that the intention to commit a felony to make a burglary muſt be an intention of ſuch a fact, as was felony by the common law, (and not of a felony newly made by act of parliament,) as larciny, or homicide.

It hath been therefore doubted, whether the breaking of a houſe in the night with intent to commit a rape be burglary or not, *Crompt. fol.* 32. thinks it is not, becauſe made felony by the ſtatute of *Weſtm.* 2. *cap.* 34. (*p*); but *Dalt. cap.* 99. *p.* 255. (*q*) thinks it would be burglary, becauſe rape was felony by the common law, until the ſtatute of *Weſtm.* 1. *cap.* 13. (*r*), which turned it into a treſpaſs puniſhable by two years impriſonment; and ſo the ſtatute of *Weſtm.* 2. was but a reſtitution of the common law, and a ſetting aſide of the ſtatute of *Weſtm.* 1. and this ſeems to be the more warrantable opinion, that it is burglary; but of this hereafter.

Now as to clergy in caſe of burglary.

If it be ſuch a burglary, as is alſo joined with actual theft or robbery, and that robbery or theft be ſo laid in the indictment, and proved upon evidence, as anſwers the ſtatute of 23 *H.* 8. *cap.* 1. or 1 *E.* 6. *cap.* 12. or 5 & 6 *E.* 6. *cap.* 9. whereof enough hath been ſaid before, then the principal in ſuch burglary is in thoſe caſes, which are within thoſe ſtatutes, ouſted of his clergy, and the acceſſaries before are ouſted of their clergy by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. but the acceſſaries after have their clergy, as hath been ſaid; but in caſe of ſimple burglary, or burglary with theft, laid to be only *felonice & burglariter*, the principal is ouſted of clergy, if outlawed or convict by verdict or confeſſion, but is not ouſted of clergy in caſe of ſtanding mute, not directly anſwering, or challenging above twenty, by the ſtatute of 18 *Eliz. cap.* 7. (*ſ*)

But by the ſtatute of 1 *E.* 6. *cap.* 12. "If the breaking of "the houſe be in the day or night-time, with intent to rob

2 "or

(*p*) 2 *Co. Inſt.* 433.
(*q*) *New Edit. p.* 489.
(*r*) 2 *Co. Inſt.* 188.
(*ſ*) This defect is ſupplied by 3 & 4 *W.* & *M. cap.* 9.

" or ſteal, any perſon being in the houſe and put in fear, tho " nothing be ſtolen, yet he ſhall be ouſted of his clergy, if " convict by verdict or confeſſion, or ſtand mute, or chal- " lenge peremptorily above twenty (*t*)"; for this ſtatute extends to this ſpecial kind of burglary, 11 *Co. Rep.* 36. *b. Poulter's* caſe, tho nothing be ſtolen, and ſo differs from the ſtatutes of 23 and 25 *H.* 8. which require a ſtealing, as well as a breaking the houſe.

(But tho in caſe of robbery in any dwelling-houſe, and therewith putting in fear, according to the ſtatute of 23 *H.* 8. *cap.* 1. or without putting in fear according to the ſtatute of 5 *&* 6 *E.* 6. *cap.* 9. the malicious commanding, hiring or counſelling of ſuch offenſe is put out of clergy, if ſo ſpecially laid in the indictment, *Dy.* 183. *b.* by the ſtatute of 4 *&* 5 *P. & M. cap.* 4. yet ſuch acceſſaries before are not ouſt of clergy in caſe of breaking a houſe to commit a robbery putting in fear, tho the principal be ouſted of clergy by 1 *Eliz. cap.* 12.)

But acceſſaries before or after are not ouſted of clergy by this ſtatute, or the ſtatute of 4 *&* 5 *P. & M. cap.* 4.

And this ſtatute doth ouſt of clergy not only thoſe, that actually break, or actually enter the houſe, but alſo all thoſe, that are in law principals in burglary, all thoſe that are preſent, aiding and aſſiſting, or that ſtand to watch at the field gate, while the others of the confederacy or company break and enter the houſe.

And ſo it differs from the caſe of robbing of a perſon in his dwelling-houſe, none being within, upon the ſtatute of 39 *Eliz. cap.* 15. for that ſtatute excludes from clergy only thoſe perſons, that actually enter into the houſe, and not thoſe, who tho of the confederacy, and preſent, aiding and abetting, yet never entred the houſe; *quod vide ſupra.*

But as to acceſſaries before or after they are not ouſted of their clergy by the ſtatute of 18 *Eliz. cap.* 7. nor doth the ſtatute of 4 *&* 5 *P. & M.* extend to ouſt acceſſaries before of clergy

(*t*) This ſtatute does not exclude thoſe who challenge peremptorily above twenty; this according to our author's opinion, (*vide poſtea Lib.* II. *cap.* 48.) was needleſs; but they are ſince excluded by 3 *&* 4 *W. & M. cap.* 9.

clergy in caſes of burglary (*u*); but in caſes of robbing of houſes within the qualifications and circumſtances of the ſtatute of 23 *H.* 8. *cap.* 1. or 5 & 6 *E.* 6. *cap.* 9. and not to burglary at large. (*x*)

And

(*u*) But they are ſince ouſted by 3 & 4 *W.* & *M. cap.* 9.

(*x*) Since our author wrote there have been other ſtatutes made to take away clergy in caſes of larciny committed in dwelling-houſes, &c.

By 3 & 4 *W.* & *M. cap.* 9. "Clergy "is ouſted from thoſe who ſhall feloni- "ouſly take away any goods in any "dwelling-houſe, any perſon being "therein and put in fear, or ſhall rob "any dwelling-houſe in the day-time, "any perſon being therein, or ſhall com- "fort, aid, counſel or command any "perſon to commit any of the ſaid of- "fenſes, or to break any dwelling-houſe, "ſhop or ware-houſe thereto belonging "and therewith uſed in the day-time, "and feloniouſly to take away any mo- "ney or goods to the value of five ſhil- "lings, altho no perſon be within ſuch "dwelling-houſe, &c. or ſhall counſel, "hire or command any perſon to com- "mit any burglary, if they be con- "victed, ſtand mute, or challenge pe- "remptorily above twenty.

The deſign of this clauſe was to deprive the acceſſaries before of the benefit of the clergy, but this ſtatute not mentioning booths nor out-houſes leaves the acceſſaries in ſuch caſes to their clergy.

The ſame ſtatute enacts, "That per- "ſons indicted for a crime, of which "being convict they ſhould not have "their clergy by any former ſtatute, "ſhall not have it, if they ſtand mute, "or will not anſwer directly, or chal- "lenge peremptorily above twenty, or "be outlawed.

"Perſons indicted of felony for ſteal- "ing of goods, &c. if convicted, ſtand "mute, will not directly anſwer, or "challenge peremptorily above twenty, "ſhall loſe their clergy, if it appear "upon evidence or examination, that "the goods were taken in another coun- "ty in ſuch a manner, whereof if con- "victed by a jury of that county they "ſhould not have their clergy.

This part of the ſtatute helps the ſeveral former acts, which were defective either as to the point of ſtanding mute, or challenging peremptorily, or being outlawed.

By 10 & 11 *W.* 3. *cap.* 23. "All per- "ſons, who by night or by day ſhall in "any ſhop, ware-houſe, coach-houſe or "ſtable privately and feloniouſly ſteal "any goods, wares or merchandizes of "the value of five ſhillings, or more, "tho ſuch ſhop, &c. be not b oke open, "and tho the owner, or any other perſon "be not therein, or that ſhall aſſiſt, "hire or command any perſon to com- "mit ſuch offenſe, being thereof con- "victed or attainted by verdict or confeſ- "ſion, or being indicted thereof ſhall "ſtand mute, or challenge above twen- "ty, ſhall be excluded from the benefit "of clergy.

The uſes of this ſtatute are theſe.

1. By the former ſtatutes (except the caſe of a booth in a fair or market, by 5 & 6 *E.* 6.) it was neceſſary in order to take away clergy, that the robbery ſhould be in a dwelling houſe, whereas this ſtatute extends to ſhops, ware-houſes, &c. tho they ſhould not be adjoining to, or be any part of a manſion houſe.

2. The former ſtatutes required there ſhould be an actual breaking or putting in fear, otherwiſe it would not be a robbery, which is the ſtealing intended by 39 *Eliz. cap.* 15. as appears from the preamble of that ſtatute; but by this ſtatute, if the goods ſtolen be of the value of five ſhillings, the offender is ouſted of clergy as to a ſhop, ware-houſe, coach-houſe, or ſtable, tho there be no breaking or putting in fear.

3. By 23 *H.* 8. and 1 *E.* 6. clergy was not taken away, unleſs there were ſome perſon in the houſe put in fear, nor by 5 & 6 *E.* 6. unleſs ſome of the family were in the houſe or booth; nor by 39 *Eliz.* unleſs it were in the day-time, and no perſon in the houſe, ſo that if the offenſe were committed when any perſon was in the houſe, if not put in fear, nor one of the family, or when no body was in the houſe, if it were in the night-

And thus far concerning larciny, robbery and burglary, which are felonies by the common law.

There are two exceptions, that are added hereunto.

1. The firſt is really true, namely when it is *tempus belli* within the kingdom, and one enemy either ſteals, robs, or plunders the houſe or goods of another, and therefore the book of 22 *Aſſiz.* 95. adds to the definition of burglary *in time of peace*, for in time of war, tho theſe kinds of offenſes committed by thoſe of the ſame party, or thoſe that are not in hoſtility one to another, are felonies, yet in time of war, when done by an enemy, they put on another name, as acts of hoſtility, miſpriſions, and the like.

Juſque datum ſceleri.

2. The ſecond is only ſuppoſititious, namely when it is done in caſe of neceſſity (*y*), as a poor perſon that in caſe of neceſſity for hunger ſhall break and enter a houſe for victuals under the value of twelve-pence, which is added as an exception to burglary, by *Crompt. fol.* 33. *a.* and *Dalt. cap.* 99. *p.* 255, 256. (*z*), for tho I do agree a judge ought to be tender in ſuch caſes, and uſe much diſcretion and moderation, yet this muſt not paſs for law, for then we ſhall in a little time let looſe all the rules of law and government, and burglaries, robberies, yea murders themſelves ſhall be excuſable under pretenſe of neceſſity, and we ſhall fall within the wild doctrine of the *Jeſuitical* caſuiſts, who of late in *France* and elſewhere, upon thoſe general miſapplied maxims of *Quicquid neceſſitas cogit, defendit*, and *in caſu extremæ neceſſitatis omnia ſunt communia*,

night-time, in neither of thoſe caſes was clergy taken away by thoſe ſtatutes, but this ſtatute takes it away in both thoſe caſes as to ſhops, &c.

But ſtill this ſtatute omitted to mention dwelling-houſes or out-houſes, wherefore to ſupply this omiſſion, another ſtatute was made, *viz.*

12 *Ann. cap.* 7. by which it is enacted, "That if any perſon ſhall feloniouſly ſteal any money, goods, or chattels, &c. of the value of forty ſhillings in any dwelling-houſe or out-houſe thereto belonging, altho it be not broken, nor any perſon therein, or ſhall aſſiſt any perſon to commit ſuch offenſe, and ſhall be convicted by verdict or confeſſion, or ſtand mute, or will not anſwer directly, or ſhall challenge peremptorily above twenty, he ſhall be debarred from the benefit of clergy.

But both theſe ſtatutes ſeem defective as to perſons outlawed.

(*y*) See *Grot. de jur. belli ac pacis, Lib.* II. *cap.* 2. §§. 6 & 7.

(*z*) *New Edit. p.* 489.

munia, have adviſed ſervants and apprentices, that it is lawful in point of conſcience to ſteal from their maſters, or rob them in caſe they make them not ſufficient allowances of meat, drink, or clothes: where laws are ſettled there are other remedies appointed for the relief of ſervants againſt oppreſſing maſters, and of the poor, by complaint to the magiſtrate without violating the eſtabliſhed laws of kingdoms or ſtates. (*)

(*) What our author here obſerves is undoubtedly true, that the plea of neceſſity ought not in ſuch caſes to be allowd, and the reaſon is, becauſe the law ſuppoſes, that no man can in a well governd commonwealth be driven to ſuch a neceſſity; this ſuppoſition is the more reaſonable in *England*, where there are ſo many laws, and ſuch large ſums yearly collected for the relief of the poor, as are more than ſufficient for that purpoſe, if rightly applied, yet ſuch is the neglect in the execution of thoſe laws, that it were to be wiſhed ſome expedient were found out to render that relief more ſpeedy and effectual, leſt, while the neceſſity be real, the relief be only ſuppoſititious, which our author himſelf thought was oft-times the caſe, notwithſtanding the proviſions of the law; (*ſee his preface to his diſcourſe touching the proviſion for the poor*,) which makes it reaſonable it ſhould be allowd as an argument for mercy, tho not as a plea in juſtification.

CHAP. XLIX.

Of arſon, *or* wilful burning of houſes.

THE felony of arſon or wilful burning of houſes is deſcribed by my lord *Coke*, *cap.* 15. *p.* 66. to be *the malicious and voluntary burning the houſe of another* by night or by day.

This was felony at common law (*a*), and one of the higheſt nature, and therefore by the ſtatute of *Weſtm.* 1. *cap.* 15. ſuch offenders were not repleviſable (*b*); and by *Briton* (*c*) the offenders herein were burnt to death, but as to that the law is changed, they are to be hanged. *H.* 7 *E.* 2. *Coram Rege Rot.* 88. *Norf.* (*d*)

By

(*a*) 3 *H.* 7. 10. *a.*
(*b*) 2 *Co. Inſtit.* 188.
(*c*) *cap.* 9.

(*d*) By the laws of *Ethelſtan* it was capital, *incendiariis capitis pœna eſto*; *vide Leg. Ethelſtan*, *l.* 6. and by the laws

By the ſtatute of 8 *H.* 6. *cap.* 6. diſperſing of bills of menace to burn houſes, if money be not laid down in a certain place, was made high treaſon, if the houſes were burned accordingly: *vide Rot. Par.* 15 *H.* 6. *n.* 23. but as to the treaſon it is repeald by the ſtatute of 1 *E.* 6. *cap.* 12. and 1 *Mar. cap.* 1. but the felony remains ſtill in caſe the houſes be burned. (*e*)

In caſes of wilful burning of houſes the indictment runs, *Quod felonicè, voluntariè & malitioſè combuſſit domum* without ſaying *domum manſionalem*, as in caſe of burglary. *Co. P. C. p.* 67.

And to examine this felony theſe things are inquirable, *viz.* 1. What ſhall be ſaid *domus*. 2. What *domus* of another. 3. What a malicious and wilful burning. 4. What kind of felony this is. 5. Whether and how clergy is allowable.

I. What ſhall be ſaid *domus*.

It extendeth not only to the very dwelling-houſe, but to all out-houſes, that are parcel thereof, tho not contiguous to it, or under the ſame roof; as in caſe of burglary, the barn, ſtable, cow-houſe, ſheep-houſe, dairy-houſe, mill-houſe. *Co. P. C. p.* 67. 11 *H.* 7. 1. *b.* (*f*)

But if the barn or out-houſe be not parcel of a dwelling-houſe, it is not felony, unleſs the barn have hay or corn in it (*g*), and then, tho it be no parcel of a dwelling-houſe, it is felony, 4 *Co. Rep.* 20. *a. Barham's* caſe; but if the barn have only hay in it, and not corn, the offender ſhall have his clergy, but if it hath corn in it, he ſhall be excluded of clergy, tho not parcel of a dwelling-houſe. *Co. P. C. p.* 69.

The

laws of *Canute* it was one of thoſe capital offenſes, for which no ranſom was allowed. *Leg. Canuti, l.* 61.

(*e*) But ſince by the 9 *Geo.* I. *cap.* 22. it is made felony without benefit of clergy knowingly to ſend any letter without a name ſubſcribed, or ſigned with a fictitious name demanding money, reaſon, or other valuable thing.

(*f*) The words of the book are, *becauſe the barn was* adjoining *to the houſe, it was holden to be felony*; to make which ſerve our author's purpoſe we are not to underſtand thereby its being contiguous, but being ſo near the houſe, as to be parcel thereof.

(*g*) But by 22 & 23 *Car.* 2. *cap.* 7. "It is felony maliciouſly to burn in the "night-time any rick or ſtack of corn, "hay or grain, *barns* or other out-"houſes, or buildings, or kilns whatſo-"ever." So that now, tho the barn be empty, it is felony; and by 9 *Geo.* I. *cap.* 22. clergy is taken away from the offender.

The burning of a frame of a houſe was no felony by the common law, but was made felony by the ſtatute of 37 *H.* 8. *cap.* 6. but that ſtands repeald by 1 *E.* 6. *cap.* 12. and 1 *Mar. cap.* 1.

The burning of a ſtack of corn was no felony by the common law, but the attempting of it was made felony by the ſtatute of 3 & 4 *E.* 6. *cap.* 5. (*b*), but that is repeald by 1 *Mar. cap.* 1. (*i*)

But by the ſtatute of 43 *Eliz. cap.* 13. the wilful and malicious burning of any barn, or ſtack of corn or grain within the counties of *Northumberland*, *Cumberland*, *Weſtmorland* or *Durham*, is made felony without benefit of clergy. (*k*)

II. What ſhall be ſaid the houſe of *another*.

A tenant for years of a houſe ſets fire to his own houſe, thereby intending maliciouſly to fire the houſe of *B.* if he burn his own houſe, and alſo thereby burn the houſe of *B.* this is felony; but if he burn not the houſe of *B.* according to his deſign, but only burn his own houſe, this is not felony, but a great miſdemeanor, for which he was ſet in the pillory, fined, and perpetually bound to the good behaviour, and yet it was of a houſe in the city of *London*, and laid that he did it *eâ intentione* to burn the houſes of others. *M.* 10 *Car.* 1. *B. R. Croke* 377. *Holmes's* caſe, adjudged.

III. It muſt be a *burning* of a houſe of another; therefore if *A.* ſets fire to the houſe of *B.* maliciouſly to burn it, but either by ſome accident or timely prevention the fire takes not, this is no felony, tho it were a malicious attempt, for the words are *Incendit & combuſſit*, but if he had burned part of the houſe, and the fire is quenched or goes out before

3 the

(*b*) This ſtatute does not make the attempt felony generally, but only where divers perſons to the number of twelve are aſſembled for that purpoſe, and continue together for the ſpace of an hour after proclamation to depart, or where any above the number of two, and under twelve, ſhall after proclamation as aforeſaid in a forcible manner attempt the ſame.

(*i*) But it is made felony by 22 & 23 *Car.* 2. *cap.* 7. and by 9 *Geo.* I. *cap.* 22. it is felony without benefit of clergy to ſet fire to any houſe, barn or out-houſe, or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay or wood.

(*k*) By 1 *Geo.* 1. *cap.* 48. it is felony maliciouſly to ſet on fire any wood, underwood or coppice. By this ſtatute clergy is not taken away, but by 9 *Geo.* I. *cap.* 22. it is felony without benefit of clergy to cut down or deſtroy any trees planted in any avenue, orchard, garden, or plantation.

the whole houſe be burned, it is felony. *Co. P. C. p. 66. Dalt. cap.* 105. (*l*)

It muſt be a *wilful and malicious* burning, otherwiſe it is not felony, but only a treſpaſs.

And therefore if *A.* ſhoot unlawfully in a hand-gun, ſuppoſe it be at the cattle or poultry of *B.* and the fire thereof ſets another's houſe on fire, this is not felony, for tho the act he was doing were unlawful, yet he had no intention to burn the houſe thereby, againſt the opinion of *Dalt. cap.* 105. *p.* 270. (*m*)

But if *A.* have a malicious intent to burn the houſe of *B.* and in ſetting fire to it burns the houſe of *B.* and *C.* or the houſe of *B.* eſcapes by ſome accident, and the fire takes in the houſe of *C.* and burneth it, tho *A.* did not intend to burn the houſe of *C.* yet in law it ſhall be ſaid the malicious and wilful burning of the houſe of *C.* and he may be indicted for the malicious and wilful burning of the houſe of *C. Co. P. C. p.* 67. (*n*)

An infant of about fourteen years of age or under may be guilty of malicious burning of houſes, if by circumſtances it can appear he knew it to be evil.

Before me at *Norfolk* a boy about the age of fourteen years was arraigned upon two ſeveral indictments for malicious and wilful burning of two ſeveral houſes, the firſt was his own father's, and it appeard, that when he had ſecretly carried fire into the barn and fired it, he falſly charged another with the fact, and upon the boy's accuſation he was impriſond, till it appeard clearly he was not the offender: this boy was afterwards together with his father and his other children entertaind at a neighbour's houſe in charity, and the boy watching opportunity, when none were in the houſe but a child in the cradle, carried fire out of the kitchin into a room of furzes, and ſet fire in it and went out, and thus burnt a ſecond houſe, and the child in the cradle; for both theſe he was queſtiond, and at length confeſſed freely the whole circumſtances of both facts, he was indicted, and upon

(*l*) *New Edit. p.* 506.
(*m*) *Ibid.*
(*n*) See the caſe of *Coke* and *Woodburne*, *State Tr. Vol.* VI. *p.* 222.

his arraignment pleaded, and upon his trial craftily inſiſted, that he was under fourteen years of age; but I directed the jury, that it appeard by the circumſtances, that his malice ſupplied his age, for it appeard, that he underſtood the evil of the firſt offenſe when he did it ſo ſecretly, and yet charged another wrongfully; but if there had been any doubt of the firſt burning, yet he could not but be conuſant, that the ſecond burning was a great crime, when he ſaw another formerly charged by him with the firſt burning committed as for felony; but yet for my farther ſatisfaction, and in reſpect the boy ſeemed very little, I took farther examination touching his age, and his father being by freely confeſſed and was content to ſwear, that he was above fourteen and near fifteen years of age, and he was convicted and executed.

IV. What felony this is.

And it ſeems unqueſtionable, that the burning of a dwelling-houſe, or any part thereof, or any out-houſe part thereof was a felony at common law, and ſo was alſo the burning of a barn with hay or corn in it, tho not parcel of a dwelling-houſe, but ſtanding at a diſtance. *Co. P. C. p.* 67. 11 *H.* 7. 1. *b.*

V. But as to the point of the not allowance of clergy therein, there may be ſome matters to be examined: certain it is, that at this day clergy is not allowable to a party convicted of wilful and malicious burning of a dwelling-houſe, or of a barn with corn; *quod vide* 11 *Co. Rep.* 34. *Poulter's* caſe adjudged *per omnes Juſtic. Plow. Com.* 475. *Co. P. C. p.* 67. and the conſtant practice hath been to deny clergy to thoſe convict of this crime; *quod vide* in the reſolution of *Poulter's* caſe.

And the ſtatute of 4 & 5 *P. & M. cap.* 4. takes away clergy from all acceſſaries before to the offenſes of wilful burning any dwelling-houſe, or of any barn then having corn or grain in the ſame; and ſurely they took the law to be, that the principal was by law ouſted of his clergy, or otherwiſe they would not have ouſted the acceſſary of his clergy.

But then the queſtion remains, what it was that ouſted the principal of his clergy.

By the ſtatute of 23 *H.* 8. *cap.* 1. clergy was ouſted from all perſons found guilty of wilful burning of any dwelling-houſes or barn, wherein any grain or corn ſhould happen to be, and from all perſons found guilty of abetting, aiding or counſelling thereof, *viz.* acceſſaries before; except perſons in order of ſubdeacon, or above.

The ſtatute of 1 *E.* 6. *cap.* 12. as to divers offenſes therein particularly mentiond, which are for the moſt part alſo included in the ſtatute of 23 *H.* 8. carried the excluſion of clergy farther, *viz.* as to ſtanding mute, or not directly anſwering, but mentions not at all wilful burning of houſes, or barns with grain; and enacted, that in all other caſes of felony perſons indicted ſhall have their clergy, as they ſhould have had before 1 *H.* 8.

So that by the act of 1 *E.* 6. clergy was reſtored to burning of houſes and barns with corn, notwithſtanding the ſtatute of 23 *H.* 8. or any other ſtatute made ſince the firſt year of *Henry* VIII. and if the ouſting of the principal in arſon from his clergy reſted upon the ſtatute of 23 *H.* 8. then the ſtatute of 1 *E.* 6. had reſtored him to his clergy.

The ſolution therefore of this matter is upon two accounts.

1. Some have thought that the wilful burning of houſes was not within clergy by the common law, nor by the ſtatute of 25 *E.* 3. *cap.* 4. becauſe it was an hoſtile act (*o*), and therefore, as until the ſtatute of 4 *H.* 4. *cap.* 2. *Inſidiatores viarum & depopulatores agrorum* joined with another felony, and ſo found, were ouſted of their clergy, becauſe ſavouring of acts of hoſtility, ſo *incendiatores domorum* were even by the common law ouſted of clergy before the ſtatute of 23 *H.* 8. and ſo are not reſtored to clergy by the general clauſe of the ſtatute of 1 *E.* 6. and this I remember was deliverd as the reaſon of the excluſion of clergy from wilful burning by Mr. Attorney *Noy*, 8 *Car.* 1. in the king's bench, and ſeemed to be aſſented to by the court. *S. P. C. l. 192. a.*

But I think this will hardly help the matter, 1. Becauſe tho poſſibly clergy might not be allowd at common law to wilful

(*o*) And ſo interpretatively *a felony touching the perſon of the king himſelf,* which by that ſtatute was ouſted of clergy.

wilful burning, yet the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* extends clergy to all treaſons and felonies touching other perſons than the king himſelf, and his royal majeſty. 2. Becauſe then as well a burning of a barn with hay, as a barn with corn, would be excluded from clergy, for the one is as hoſtile as the other.

2. Others have thought that the ſtatute of 4 *&* 5 *P. & M. cap.* 4. taking away clergy from the acceſſaries before doth take away by neceſſary conſequence the clergy from the principal, for it were not reaſon to think the acceſſary before ſhould be in a worſe condition, than the principal offender, and therefore virtually and implicatively and by neceſſary conſequence it takes away clergy from the principal in all thoſe caſes, where it takes it from the acceſſary before, and beſides, if the principal had his clergy, the acceſſary could not be arraigned, and this I think is true, tho this caſe needs not this help.

But I think, and ſo is the book of 11 *Co. Rep.* 34, 35. that the ſtatute of 25 *H.* 8. *cap.* 3. which extends to take away clergy in all thoſe caſes, which were within 23 *H.* 8. *cap.* 1. and particularly recites that of burning houſes and barns with grain, and farther extends that excluſion to ſtanding mute, not directly anſwering, challenging above twenty, I ſay that ſtatute of 25 *H.* 8. was in great part repeald by the ſtatute of 1 *E.* 6. and is entirely revived by the ſtatute of 5 *&* 6 *E.* 6. *cap.* 10. not only as to the point of ouſting clergy upon examination (*p*), but alſo as to the excluſion of clergy in thoſe caſes mentiond in the act of 25 *H.* 8. wherein burning of houſes and barns with corn is expreſly mentiond, ſo that conſequently this ſtatute of 5 *&* 6 *E.* 6. reviving the ſtatute of 25 *H.* 8. repeals the generality of that clauſe in 1 *E.* 6. whereby clergy was let in in all caſes there not enumerated.

2 And

(*p*) This relates to the ſecond clauſe of the 25 *H.* 8. *cap.* 3. whereby it is provided, that if any perſons be indicted in one county for ſtealing goods in another, and ſtand mute, or challenge peremptorily above twenty, or will not directly anſwer, they ſhall be put from their clergy in like manner, as if they had been tried and found guilty in the ſame county, where the offenſe was committed, if it appear to the juſtices by the evidence or on examination, that it was ſuch a felony, as if found guilty thereof in the county where committed, they would have loſt their clergy by the 23 *H.* 8. *cap.* 1.

And conſequently the periods of this caſe of clergy in wilful burning ſtand thus.

1. Before 23 *H.* 8. clergy was allowable therein by force of the ſtatute of 25 *E.* 3. *pro clero.*

2. After 23 *H.* 8. until 25 *H.* 8. clergy was allowable for the acceſſary in all caſes, and for the principal in all caſes, but finding him guilty.

3. After 25 *H.* 8. until 1 *E.* 6. clergy was taken away from the principal as well where he ſtands mute, not directly anſwers or challenges above twenty, as where he is found guilty.

But the acceſſaries as well before as after were to have clergy.

4. After 1 *E.* 6. till 5 & 6 *E.* 6. when the ſtatute of 25 *H.* 8. was revived, both principal and acceſſaries had their clergy in all caſes of burning.

5. After 5 & 6 *E.* 6. till 4 & 5 *P.* & *M. cap.* 4. the principal was excluded in all caſes, wherein he was excluded by the ſtatute of 25 *H.* 8. as well where he ſtood mute, challenged above twenty, did not directly anſwer, as where found guilty. (*q*)

But the acceſſaries before as well as after had their clergy.

6. By the ſtatute of 4 & 5 *P.* & *M. cap.* 4. until this day acceſſaries before are excluded of clergy in all caſes, but acceſſaries after have their clergy.

But yet there ſtill remain two doubts.

1. Whereas the ſtatute of 4 & 5 *P.* & *M. cap.* 4. extends to ouſt clergy from the acceſſary, as well if he be attainted as convicted, and conſequently if outlawed, he ſhall not have clergy, becauſe it is an attainder; the ſtatute of 25 *H.* 8. extends only to finding guilty, challenging above twenty, ſtanding mute, or not directly anſwering, and it ſeems in attainder of the principal by outlawry he ſhall have his clergy; therefore *quære*, whether an attainder by outlawry ouſt the principal of clergy upon the ſtatute of 23 or 25 *H.* 8.

(*q*) By 3 & 4 *W.* & *M.* clergy is taken away in caſe of outlawry alſo.

2. Whereas the ſtatute of 4 & 5 *P. & M. cap.* 4. hath no exception of perſons in the order of ſub-deacon; but acceſſaries before are ouſted of their clergy in all caſes by that ſtatute, tho in orders.

Yet by the ſtatute of 25 *H.* 8. which is relative to the ſtatute of 23 *H.* 8. principals in the order of ſub-deacon, or above, have their clergy in the caſe of arſon, for by the ſtatute of 23 *H.* 8. clergy is ſaved to men in orders, where found guilty; and by the ſtatute of 25 *H.* 8. in caſes of ſtanding mute, *&c.* they are ouſted of their clergy as if found guilty, in which caſe men in orders had their clergy, and ſo the reviving of the ſtatute of 25 *H.* 8. by that of 5 & 6 *E.* 6. lets in men in orders to their clergy in caſe of arſon, which ſeems to make this abſurdity, that the principal in arſon ſhall have the benefit of clergy if in orders, but the acceſſaries before, tho in orders, are excluded by the general penning of the act of 4 & 5 *P. & M.*

And herein there will ariſe a difference as to men in orders in relation to the benefit of clergy between the caſe of being principal in wilful burning of houſes, and the caſe of being principal in robbery in or near the highway, or robbing in a dwelling-houſe, putting the dweller in fear, or murder of malice prepenſe; for the act of 1 *E.* 6. *cap.* 12. excludeth them from their clergy generally without exception of men in orders, tho they were excepted by the ſtatutes of 23 and 25 *H.* 8.

But this ſtatute of 1 *E.* 6. making no mention of burning of houſes, the excluſion of them from clergy, if reſting upon the ſtatute of 25 *H.* 8. revived by 5 & 6 *E.* 6. excepts them.

CHAP. L.

Concerning felonies by the common law, *relating to the* bringing of felons to juſtice, *and the* impediments *thereof, as eſcape, breach of priſon, and reſcue; and firſt touching* arreſts.

I Come now according to the method propounded to conſider thoſe felonies, that relate to the public juſtice of the kingdom in bringing malefactors to their due puniſhment, and the impediments thereof, and they are principally three, *viz.* 1. By the party arreſting or impriſoning, as voluntary eſcapes. 2. By the party arreſted and impriſoned, as breach of priſon. 3. By a ſtranger, as reſcue of felons.

And in this order I ſhall examine theſe offenſes, but as a neceſſary preliminary thereunto, I ſhall firſt conſider of arreſts and impriſonment for capital offenſes, by whom it may be done, and where lawful.

Arreſts of malefactors are of two kinds, 1. Either by perſons thereunto by law deputed, or 2. By private perſons.

And the former is again of two kinds. Either, 1. By proceſs of law, or 2. *Virtute officii.*

The former again is of two kinds, 1. Either by proceſs in the king's name, 2. Or by warrant in the name of a judge of juſtice thereunto authorized, and that either in writing or *ore tenus.*

I ſhall purſue this order, and

I. Shall begin with the firſt of theſe; namely, arreſting by virtue of the king's writ.

Regularly no proceſs iſſues in the king's name and by his writ to apprehend a felon or other malefactor, unleſs there be

be an indictment, or matter of record in the court, upon which the writ iſſues.

Antiently the proceſs upon an appeal or an indictment of felony was only one *Capias*, and thereupon an *Exigent.* 22 *Aſſiz.* 81.

By the ſtatute of 25 *E.* 3. *cap.* 14. there are to be a *Capias* and an *Alias* with a command to the ſheriff to ſeize the goods of the felon, and then an *Exigent.*

But it ſhould ſeem by the book of 8 *H.* 5. 6. that this ſtatute extended not to felony of death, but that there ſhould be only one *Capias*, and then an *Exigent.*

But by the ſtatute of 6 *H.* 6. *cap.* 1. if *A. de B. in comitatu S.* be indicted in the king's bench in *Middleſex*, there ſhall go out one *Capias* into *Middleſex*, another into *S.* and each ſhall have ſix weeks at leaſt between the *Teſte* and return, and upon *Non inventus* returned then an *Exigent.*

But if he be not named of another county, then it ſeems only one *Capias* ſhall iſſue, where the party is indicted, and upon that an *Exigent*: this ſtatute was made during the king's pleaſure, but by the proviſo in the ſtatute of 8 *H.* 6. *cap.* 10. it ſeems to be made perpetual.

By the ſtatute of 8 *H.* 6. *cap.* 10. if *A. de B. in com. S.* be indicted or appeald *in com. W.* before juſtices aſſigned, there ſhall go out firſt a *Capias in com. W.* and upon *Non inventus* returned a *Capias* with proclamations *in com. S.* having three months at leaſt between the *Teſte* and return, or otherwiſe no *Exigent* to iſſue; but the proceſs in the king's bench is excepted.

But this ſtatute only extends, where the party is indicted in another county, than where converſant.

By the ſtatute of 5 *E.* 3. *cap.* 11. juſtices of *oyer* and *terminer* may iſſue proceſs againſt felons in a forein county, and theſe proceſſes ought, or at leaſt may and are moſt fit to iſſue in the king's name under the *Teſte* of the chief judge, for which purpoſe all clerks of aſſizes have a ſpecial ſeal, and iſſue their proceſs in the king's name in caſe of felony, where they go to the outlawry, tho ſome other warrants are made in the name of the judge.

And in all caſes the king's writs are directed to the ſheriff, and he executes the writ himſelf or by his warrant under ſeal to the bailiffs.

And upon theſe writs the ſheriff or his bailiff may break open doors to take the offenders, for they are for the king and preſervation of the peace, and therefore include a *non omittas propter aliquam libertatem*; *quod vide* 5 *Co. Rep.* 92. *a.*

And in this caſe the ſheriff or his bailiff may require any perſons preſent to aſſiſt him in execution of the writ, and he, that refuſeth to aſſiſt him, is indictable and puniſhable by fine and impriſonment.

II. The ſecond kind of arreſt is by warrant under the ſeal of the juſtices thereunto authorized, as juſtices of *oyer* and *terminer*, or of gaol-delivery, or juſtices of peace.

And herein theſe things are conſiderable: 1. What are the eſſentials of ſuch a warrant, without which it is void in law. 2. Who may grant a warrant to apprehend a felon. 3. To whom, and 4. In what order or method it is to be granted, or 5. Executed, and in what caſe.

1. As to the firſt of theſe.

It is neceſſary that ſuch warrant expreſs the name of the party to be taken, for a warrant granted with a blank and ſealed, and after filled up with the name of the party to be taken is void in law. *Dalt. cap.* 117. *p.* 329. (*a*)

It muſt be under ſeal, tho ſome have thought it ſufficient if it be in writing ſubſcribed by the juſtice, *Dalt. cap.* 117. *p.* 328. *vide* 2 *Co. Inſtit. ſupra ſtatutum de frangentibus priſonam*, *p.* 591. and the failing in theſe things will make the warrant void, and ſubject the officer to a falſe impriſonment; tho in ſome caſes the want of due formality may be blameable in him that makes the warrant, yet it will not therefore ſubject the officer to a falſe impriſonment, if the matter be within the juriſdiction of him that makes it; as for inſtance,

A warrant by a juſtice to apprehend *J. S.* to anſwer ſuch matters as ſhall be objected againſt him *ex parte domini regis* without expreſſing the certainty of the crime, this is not regular, *Lambard's* juſtice 95, 96. 2 *Co. Inſtit.* 591, 615. tho

(*a*) *New Edit. p.* 574.

Mr. *Dalt. cap.* 117. *p.* 329. gives inſtances of ſuch warrants granted by *Popham* chief juſtice.

And therefore, if before commitment a perſon ſo apprehended ſhould be removed into the king's bench by *Habeas Corpus* upon ſuch a warrant, or ſhould be committed upon ſuch a general *Mittimus*, he ſhould be diſcharged, or in caſe he ſhould be reſcued upon ſuch an apprehenſion by ſuch a warrant, or be voluntarily let go by him that apprehends him, (tho it may be the true cauſe of the warrant were felony,) yet it not being expreſſed in the warrant, ſuch an eſcape or ſuch a reſcue would not be felony.

Yet it may excuſe the officer in falſe impriſonment, if the true cauſe were felony, or any miſdemeanor within the cognizance of him that makes the warrant, for it is but an erroneous, not a void warrant, and it is not reaſonable to ſuppoſe the officer ſhould be conuſant of the formalities of law, or adviſe with counſel upon all occaſions, whether the warrant were in ſtrictneſs of law regular, eſpecially in ſuch a caſe where the error of this nature hath been ſeconded with common practice; but of this more hereafter.

2. As to the perſons, that may grant a warrant for apprehending a felon.

The chief juſtice of the king's bench or any other judge of that court may iſſue a warrant in his own name, for the apprehending and bringing before him any perſon touching whom oath is made of a felony committed, or of ſuſpicion of felony upon him, into any county of *England* or *Wales*, for they are intruſted with the conſervation of the peace through all *England*, and are more than juſtices of peace or *oyer* and *terminer*, and this hath been uſual in all ages.

But to avoid the trouble to the country in bringing up offenders they uſually direct their warrants to apprehend the parties, and bring them before ſome juſtice of peace near adjoining, either to be examined or bound over to the ſeſſions and farther to be proceeded againſt according to law.

And thus their warrants ought to run in caſes of ſurety of the peace or good behaviour againſt a perſon in another county, than where they are by reaſon of the ſtatute of 21 *Jac. cap.* 8.

Juſtices of *oyer* and *terminer* may alſo iſſue their warrants in the counties within their commiſſion for apprehending felons or other malefactors, or for ſurety of the peace within their limits; *quære*, whether they may not iſſue their warrants for any indicted of felony within their precincts, tho they are abroad in a forein county, by the ſtatute of 5 *E.* 3. before-mentiond?

Juſtices of peace may alſo iſſue their warrants within the precincts of their commiſſion for apprehending perſons charged of crimes within the cognizance of the ſeſſions of the peace, and bind them over to appear at the ſeſſions, and this, tho the offender be not yet indicted.

And therefore the opinion of my lord *Coke*, 4 *Inſtit.* 177. is too ſtrait-laced in this caſe, and, if it ſhould be received, would obſtruct the peace and good order of the kingdom; and the book of 14 *H.* 8. 16. upon which he grounded his opinion, was no ſolemn reſolution, but a ſudden and extrajudicial opinion, and the defendant had liberty to mend his plea as to the circumſtance of time, to the end it might be judicially ſettled by demurrer, which was never done; and the conſtant practice hath obtaind contrary to that opinion; *quod vide Dalt. cap.* 117. (*b*)

And whereas my lord *Coke ubi ſupra* ſaith alſo, that a juſtice of peace upon oath made by *A.* of a felony committed, and that *A.* ſuſpects *B.* and ſhews his cauſe, cannot iſſue a warrant to bring *B.* before him for farther examination, and thereupon commit or bind him over to the aſſizes or ſeſſions, becauſe it muſt be the proper ſuſpicion of *A.* himſelf, and *A.* may arreſt him upon the ſcore of his own ſuſpicion, but not by warrant of the juſtice; I think the law is not ſo, and the conſtant practice in all places hath obtaind againſt it, and it would be pernicious to the kingdom if it ſhould be as he delivers it, for malefactors would eſcape unexamined and undiſcovered, for a man may have a probable and ſtrong preſumption of the guilt of a perſon, whom yet he cannot poſitively ſwear to be guilty.

Therefore I think, that if *A.* makes oath before a juſtice of peace of a felony committed in fact, and that he ſuſpects *B.* and

(*b*) *New Edit. p.* 576.

and ſhews probable cauſe of ſuſpicion, the juſtice may grant his warrant to apprehend *B.* and to bring him before him, or ſome other juſtice of peace to be examined, and to be farther proceeded againſt, as to law ſhall appertain; and upon this warrant the conſtable, or he, to whom the warrant is directed, may arreſt him, and if occaſion be, may break doors to take him, if within a houſe, and will not upon demand render himſelf, as well as if it were an expreſs and poſitive charge of felony ſworn by *A.* againſt him, and ſo hath common practice obtaind notwithſtanding that opinion: *vide* ſtatute *Weſtm.* 1. *cap.* 15. (*c*), 13 E. 4. 9. *a.*

But a general warrant upon a complaint of a robbery to apprehend all perſons ſuſpected, and to bring them before, *&c.* was ruled void, and falſe impriſonment lies againſt him, that takes a man upon ſuch a warrant, *P.* 24 *Car.* 1. upon evidence in a caſe of juſtice *Swallow*'s warrant before juſtice *Roll.*

If *A.* hath committed treaſon, tho the juſtices of the peace have no cognizance of it as treaſon, yet they have cognizance of it as a felony, and as a breach of the peace, and therefore a juſtice of peace upon information upon oath may iſſue his warrant to take him, and may take his examination, and commit him to priſon.

A. commits a felony in the county of *B.* and then goes into the county of *C.* upon information given to a juſtice of peace of the county of *C.* he may iſſue his warrant to take him, may take his examination, and commit him to gaol in the county of *C.* from whence he may be removed by *Habeas Corpus* to the county of *B.* for his trial.

If *A.* commit a felony in the county of *B.* and upon a warrant iſſued againſt him by a juſtice of peace in the county of *B.* he is purſued and flies into the county of *C.* and there is taken, he muſt not by virtue of that warrant be carried to a juſtice of peace of the county of *B.* where he committed the felony, but to a juſtice of peace in the county of *C.* where he was taken.

But if *A.* were taken by the warrant in the county of *B.* and break away into the county of *C.* and be there taken upon freſh

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(*c*) 2 *Co. Inſt. p.* 185.

freſh ſuit by them that firſt took him, he may be either brought to a juſtice of the county of *C.* where he was laſt taken, or before the juſtice of the county of *B.* by whoſe warrant he was firſt taken, for in ſuppoſition of law he was always in cuſtody: *vide dubitatur* 13 *E.* 4. 9. *a.*

If *A.* be in commiſſion of the peace in the county of *B.* and happen to be in the county of *C.* and there complaint is made to him of a felony in the county of *B.* where he is in commiſſion, as he cannot iſſue a warrant out to apprehend the party, ſo neither can he impriſon in the county of *C.* becauſe an act of juriſdiction, but he may take an oath of a party robbed in purſuance of the ſtatute of 27 *Eliz.* or he may take an examination or information, or recognizance in a forein county, but cannot compel them by impriſonment. *P.* 7 *Car.* 1. *Croke, n.* 3. *Helyar's* caſe (*d*), *Dalt. cap.* 6. and 117. (*e*)

But if *A.* be a juſtice of peace in two adjacent counties, tho by ſeveral commiſſions, as the recorder of *London* is, nothing is more uſual for him, than whilſt he lives in one county to ſend his warrants to apprehend malefactors in another, and to ſend them to *Newgate*, which is the common gaol of both counties *London* and *Middleſex.*

3. Touching the perſons, to whom a warrant may be directed.

The juſtice, that iſſues the warrant, may direct it to a private perſon if he pleaſe, and it is good, but he is not compellible to execute it, unleſs he be a proper officer. 14 *H.* 8. 16. *Dalt. cap.* 117. *p.* 332. (*f*)

The warrant is ordinarily directed to the ſheriff or conſtables, and they are indictable and ſubject thereupon to a fine and impriſonment, if they neglect or refuſe it.

If directed to the ſheriff, he may make a warrant to his bailiff to execute it.

If to a conſtable, tithing-man, *&c.* he muſt execute it himſelf, and may not ſubſtitute another, but he may call any perſons to aſſiſt him, and they are bound to aſſiſt him, and are indictable if they neglect or refuſe to aſſiſt: *vide Dalt. ubi ſupra.*

(*d*) *Cro. Car.* 211. (*e*) *New Edit. p.* 25 & 575. (*f*) *New Edit. p.* 577.

If directed to the conſtable of *D.* he is not bound to execute the warrant out of the precincts of his conſtablewick, but if he doth it out of his conſtablewick, it is good, and ſo it was ruled in *Norfolk* in an action of treſpaſs.

4. Touching the order in granting it.

1. It is convenient, tho not always neceſſary, to take an information upon oath of the perſon that deſires the warrant, that a felony was committed, that he doth ſuſpect or know *J. S.* to be the felon, and if ſuſpected, then to ſet down the cauſes of his ſuſpicion.

2. If the charge of the felony be poſitive and expreſs, then it is fit to bind the party by recognizance to proſecute, before the warrant be iſſued.

But if it be only a charge of ſuſpicion, and the buſineſs requires farther examination, then it is neither neceſſary, nor fit to bind over the party to proſecute, for poſſibly upon the bringing in of the party accuſed and farther examination of the fact there may be cauſe to diſcharge him, and thus I think Mr. *Dalton* to be intended, *cap.* 117. *p.* 334. (*g*), the caſe before chief juſtice *Flemming*.

3. The warrant may iſſue to bring the party before the juſtice, that granted the warrant ſpecially, and then the officer is bound to bring him before the ſame juſtice, but if the warrant be to bring him before any juſtice, then it is in the election of the officer to bring him before what juſtice of the county he thinks fit, and not in the election of the priſoner. 5 *Co. Rep.* 59. *b. Foſter*'s caſe.

5. Touching the demeanor of the officer in executing the warrant.

If it be a warrant for felony, or a warrant for ſurety of the peace, the officer may break open the door, if he be ſure the offender is there, if after acquainting them of the buſineſs, and demanding the priſoner, he refuſe to open the door, tho the party be not indicted; and this is the conſtant practice againſt the opinion of my lord *Coke*, 4 *Inſt.* 177. *quod vide Dalt. cap.* 117. *p.* 333. (*h*)

3 And

(*g*) *New Edit. cap.* 169. *p.* 379. (*h*) *New Edit. p.* 378.

And ſo it is if the warrant be only upon ſuſpicion of felony, as hath been ſaid before; for in both caſes the proceſs is for the king, and therefore a *Non omittas* is implied, and he, that diligently conſidereth the ſtatute of *Weſtm.* 1. *cap.* 15. (*i*), and the ſtatute of 2 *&* 3 *P. & M. cap.* 10. will find that an impriſonment may be made by the juſtice, as well for ſuſpicion of felony, as for an abſolute charge of felony, and that as well before indictment as after.

And by the book of 13 *E.* 4. 9. *a.* A man, that arreſts upon ſuſpicion of felony, may break open doors, if the party refuſe upon demand to open them, and much more may it be done by the juſtice's warrant.

If the officer be demanded he muſt ſhew his warrant, but if he doth it *virtute officii* as a conſtable, *&c.* it is ſufficient to notify, that he is the conſtable, or that he arreſts in the king's name. *Dalt. ubi ſupra*, 6 *Co. Rep.* 54. *a.* 9 *Co. Rep.* 69. *a. Mackally's* caſe.

Laſtly, What is to be done after the warrant ſerved, and when the perſon accuſed is brought before the juſtice thereupon.

If there be no cauſe to commit him found by the juſtice upon examination of the fact, he may diſcharge him.

If the caſe be bailable, he may bail him.

If he have no bail, or the caſe appears not to be bailable, he muſt commit him.

And being either bailed or committed, he is not to be diſcharged till he be convicted or acquitted, or deliverd by proclamation. *Co. P. C. cap.* 100. *p.* 209.

And this leads me to the *Mittimus* or the warrant to the gaoler to receive him; and this is the ground of the felony in caſe of a breach of priſon.

My lord *Coke*, 2 *Inſtit.* 591. makes three eſſential parts of the *Mittimus*.

1. That it be in writing ſealed by the juſtice that commits, and without this part the commitment is unlawful, the gaoler is liable to a falſe impriſonment, and the wilful eſcape by the gaoler, or breach of priſon by the priſoner, makes no felony.

But

(*i*) 2 *Co. Inſt.* 185.

But this muſt not be intended of a commitment in a court of record, as the king's bench, gaol-delivery, or ſeſſions of the peace, for there the record itſelf, or the memorial thereof, which may at any time be entred of record, are a ſufficient warrant without any warrant under ſeal.

2. That it expreſs the cauſe for which he is committed, namely felony, and what kind of felony.

This ſeems requiſite to make the voluntary eſcape or breach of priſon felony, and alſo it is neceſſary upon return of the *Habeas Corpus* out of the king's bench, becauſe that is in nature of a writ of right or writ of error to determine, whether the impriſonment be good or erroneous.

But it ſeems not to make the commitment abſolutely void, ſo as to ſubject the gaoler to a falſe impriſonment, but it lies in averment to excuſe the gaoler or officer, that the matter was for felony.

And alſo upon ſuch a general warrant without expreſſing any felony or treaſon, or ſurety of the peace, the conſtable cannot break open a door. *T. 9 Jac. B. R.* 1 *Bulſtrode* 146. *Foſter*'s caſe.

3. That it have an apt concluſion, *viz. There to remain till deliverd by law.*

But if the concluſion be irregular, I think it makes not the warrant void, but the law will reject that which is ſurpluſage, and the reſt ſhall ſtand.

And therefore if the cauſe be expreſſed, and the concluſion irregular, as *till farther order given by the juſtice*, yet a breach of priſon under ſuch a warrant will be felony, yea, if the party be removed by *Habeas Corpus*, tho the concluſion be irregular, yet if the matter appear to be ſuch, for which he is to remain in cuſtody, or be bailed, he ſhall be bailed or committed as the caſe requires, and not diſcharged, but the idle concluſion ſhall be rejected.

And therefore I do think that ſuch a warrant is a good juſtification in a falſe impriſonment, tho the right concluſion be omitted, or tho the wrong concluſion be inſerted, if the matter of the *Mittimus* be otherwiſe ſufficient to charge him in cuſtody, and therefore it is a lawful warrant notwithſtand-

ing the omiſſion or incongruity of the concluſion, ſo as to make the voluntary permiſſion of an eſcape or the breach of priſon felony.

By the ſtatute of 23 *H.* 8. *cap.* 2. the felons are to be ſent to the common gaol (*i*); and by the ſtatute of 4 *E.* 3. *cap.* 10. the ſheriffs and gaolers are bound to receive them, whether committed by juſtices, or attached *ex officio* by conſtables.

Previous to the commitment of felons, or ſuch as are charged therewith, there are required three things, 1. The examination of the perſon accuſed, but without oath. 2. The farther information of accuſers and witneſſes upon oath. 3. The binding over of the proſecutor and witneſſes unto the next aſſizes or ſeſſions of the peace, as the caſe requires.

1. The examination of the perſon accuſed, which ought not to be upon oath, and theſe examinations ought to be put in writing, and returned or certified to the next gaol-delivery or ſeſſions of the peace, as the caſe ſhall require by the ſtatute of 2 & 3 *P.* & *M.* *cap.* 10. and being ſworn by the juſtice or his clerk to be truly taken may be given in evidence againſt the offender. (*k*)

And in order thereunto, if by ſome reaſonable occaſion the juſtice cannot at the return of the warrant take the examination, he may by word of mouth command the conſtable or any other perſon to detain in cuſtody the priſoner till the next day, and then to bring him before the juſtice for farther examination; and this detainer is juſtifiable by the conſtable, or any other perſon, without ſhewing the particular cauſe, for which he was to be examined, or any warrant *in ſcriptis*, *T.* 37 *Eliz. Rot.* 244. *B. R. Broughton* and *Marſhaw*. (*l*)

(*i*) *And not elſewhere*, ſo that it ſhould ſeem that commitments to *New Priſon* or the *Gate-houſe* are irregular; ſee 2 *Co. Inſt.* 43. *Cro. Eliz.* 830. and of this opinion was chief juſtice *Holt* in the caſe of *Kendal* and *Roe*, *State Tr. Vol.* IV. *p.* 862. See alſo 5 *H.* 4. *cap.* 10. which ordains, "That none be impriſoned "by juſtices of the peace, ſave only in "the common gaol." 9 *Co. Rep.* 119. *b.*

(*k*) Altho they be not evidence againſt any other perſon named in them; it was therefore very irregular in the chief juſtice to refuſe reading the examinations of *Stern* and *Boroski* at their trial; ſee *State Tr. Vol.* III. *p.* 470.

(*l*) This caſe is reported in *Moore* 408. by the name of *Broughton* and *Muſſhoe*.

But the time of the detainer muſt be reaſonable, therefore a juſtice cannot juſtify the detainer of ſuch perſon ſixteen or twenty days in order to ſuch examination. (*m*)

2. He muſt take information of the proſecutor or witneſſes in writing upon oath, and return or certify them at the next ſeſſions or gaol-delivery, and theſe being upon the trial ſworn to be truly taken by the juſtice or his clerk, *&c.* may be given in evidence againſt the priſoner, if the witneſſes be dead or not able to travel.

3. Before he commit the priſoner he is to take ſurety of the proſecutor to prefer his bill of indictment at the next gaol-delivery or ſeſſions, and likewiſe to give evidence; but if he be not the accuſer, but an unconcerned party, that can teſtify, the juſtice may bind him over to give evidence, and upon refuſal in either caſe may commit the refuſer to gaol. *Stamf. P. C. p.* 163. *a. Dalt. cap.* 116. *p.* 326. (*n*), 2 *&* 3 *P. & M. cap.* 10. and *Dalt. cap.* 20. *p.* 55. (*o*)

And thus far of arreſts by warrant in writing.

Next come to be conſiderd arreſts by command *ore tenus* or by order.

The chief juſtice, or other juſtice of the king's bench, may command *ore tenus* the marſhal or any of his deputies commonly called tipſtaves to arreſt any perſon, and ſuch command is a good juſtification in falſe impriſonment brought, altho 1. It be not in writing. 2. Altho no cauſe is expreſſed in the command, but only generally to anſwer ſuch things, as ſhall be objected againſt him *ex parte domini regis.* 3. And altho the command be *ita quod habeas corpus coram capitali juſticiario &c. quandocunque &c.* for it ſhall be intended, *when the party complains.* 4. Altho the defendant declares not in his juſtification, what he did with him in the mean time. *P.* 11 *Car. B. R. Throgmorton* and *Allen*, adjudged upon a demurrer. (*)

Altho, as hath been ſaid, a juſtice cannot grant a warrant to apprehend all perſons ſuſpected, but muſt name their names, yet I have known in the king's bench upon a riot com-

(*m*) See the caſe of *Savage* and *Fareham*, *Cro. Eliz.* 829. where it was adjudged, that the time of detainer muſt not exceed three days.

(*n*) *New Edit. cap.* 168. *p.* 572.

(*o*) *New Edit. cap.* 40. *p.* 106.

(*) 2 *R. A. p.* 558.

committed in the night by perſons diſguiſed, and whoſe names have not been known, the court hath made an order to apprehend perſons, that the party, who was injured, ſuſpects, and to bring them into the court to be examined, and ſuch order of the court is a good warrant for the ſheriff or conſtable to do it; but what is thus done in the higheſt court of ordinary juſtice, is not to be a pattern for particular juſtices or inferior juriſdictions.

I have now done with arreſts by writs or warrants.

I come in the next place to arreſts *ex officio* without any warrant.

If an affray be made in the preſence of a juſtice of peace, or if a felon be in his preſence, he may arreſt him, and detain him *ex officio* till he can make a warrant to ſend him to gaol, but then the warrant muſt be in writing to the gaoler, P. 23 *Car. B. R. Sandford's* caſe, and ſo he may by word command any preſent to arreſt. *Dalt. cap.* 117. *p.* 328. (*p*)

A conſtable may *ex officio* arreſt a breaker of the peace in his view, and keep him in his houſe, or in the ſtocks, till he can bring him before a juſtice of peace.

So if *A.* be dangerouſly hurt, and the common voice is, that *B.* hurt him, or if *C.* thereupon come to the conſtable and tell him that *B.* hurt him, the conſtable may impriſon him till he know whether *A.* die or live. T. 43 *Eliz. B. R. Dumbleton's* caſe, or can bring him before a juſtice.

So if a felony be committed, and *A.* acquaint him that *B.* did it, the conſtable may take him and impriſon him, at leaſt till he can bring him before ſome juſtice of peace.

But if there be only an affray and not in view of the conſtable, it hath been held he cannot arreſt him without a warrant from the juſtice; but it ſeems he may to bring the offender before a juſtice, tho not compellible.

Laſtly, I come to the authority of every private perſon in relation to arreſts of felons.

If *A.* commit a felony, *B.* who is a private perſon, may arreſt him for that felony without any warrant, nay farther, if *A.* will not ſuffer himſelf to be taken, but either reſiſts or flies

(*p*) *New Edit. cap.* 169. *p.* 574.

flies ſo that he cannot be taken unleſs he be ſlain, if *B.* or any in aſſiſtance in that caſe of neceſſity kill him, it is no felony; *de quo antea p.* 481.

If *A.* commit a felony in the ſight of *B.* and *B.* uſe not his beſt endeavours to apprehend him, or to raiſe hue and cry upon him, it is puniſhable by fine and impriſonment. *Co. P. C. p.* 53.

If *A.* ſtrike *B.* dangerouſly in the preſence of *C. C.* may juſtify the impriſoning of *A.* till he can bring him before a juſtice, or deliver him to the conſtable, tho it be no felony till death.

If a hue and cry be levied upon a felony, and come to the town, *B.* the conſtable, and thoſe of the town are bound to apprehend the felon if in the town, or if not in the town, then to follow the hue and cry, otherwiſe they are puniſhable upon an indictment. *Co. P. C. cap.* 52.

If the conſtable in purſuit of a felon require the aid of *J. S.* he is bound by law to aſſiſt him, and is finable for his neglect. (*q*)

If a felony be committed in fact, and *A.* ſuſpects *B.* did it, and hath probable cauſe of ſuſpicion, *A.* may arreſt *B.* for it, and juſtify it in an action of falſe impriſonment. 2 *E.* 4. 8. *b.*

The cauſes of ſuſpicion are many, as common fame, finding goods upon him, and many more, *de quibus vide Dalt. cap.* 118. (*r*)

If a felony be committed, and *A.* ſuſpect *B.* and *B.* being in his houſe refuſe to open the doors or render himſelf, it ſeems *A.* may break open the doors to take him, and ſo may the conſtable, if *A.* acquaint him therewith, eſpecially if *A.* be preſent, 13 *E.* 4. 9. *a.* tho (as hath been ſaid) my lord *Coke*, 4 *Inſtit.* 177. be to the contrary, yet the common practice and opinion hath obtaind in that caſe againſt my lord *Coke*, *Dalt. cap.* 98. *p.* 249. (*ſ*), *cap.* 78. *p.* 204. (*t*), 7 *E.* 3. 16. *b.*

There are ſpecial caſes where a conſtable having received information of the miſdemeanors following, or any private perſon

(*q*) 13 *H.* 7. 10. *b.*
(*r*) *New Edit. cap.* 179.
(*ſ*) *New Edit. p.* 482.
(*t*) *New Edit. p.* 426.

perſon without a warrant may arreſt and break open doors to arreſt, if they within refuſe to open them upon demand, or to deliver up the party.

1. Where a felony or treaſon is committed, and the offender is within the houſe.

2. Where a felony or treaſon is committed, and a man ſuſpects *J. S.* who is in the houſe, and hath probable cauſe of ſuch ſuſpicion, tho the party be not indicted. 7 *E.* 3. 16. *b.* 13 *E.* 4. 9. *a.*

3. Where *A.* hath dangerouſly wounded *B.* and then *A.* flies into the houſe, whether it were done in the preſence of the conſtable, or him that arreſts or not. 7 *E.* 3. 16. *b.* *Crompt.* 171. *a.*

4. Where there is an affray made in a houſe, and the doors are ſhut, and are refuſed to be opened, during ſuch affray the conſtable or any other may break open the doors to preſerve the peace, and prevent bloodſhed; but after the affray it cannot be done without a warrant, unleſs a man be dangerouſly wounded or killed in the affray.

Yet to avoid queſtion in theſe caſes, it is beſt to obtain the warrant of a juſtice, if the time and neceſſity will permit.

When a private perſon hath arreſted a felon, or one ſuſpected of felony, he may detain him in cuſtody till he can reaſonably diſmiſs himſelf of him; but with as much ſpeed as conveniently he can, he may do either of theſe things.

1. He may carry him to the common gaol, 20 *E.* 4. 6. *b.* but that is now rarely done.

2. He may deliver him to the conſtable of the vill, who may either carry him to the common gaol, *vide* 4 *E.* 3. *cap.* 10. or to a juſtice of peace to be examined, and farther proceeded againſt as caſe ſhall require. 10 *E.* 4. (*u*) 17. *b.*

3. Or he may carry him immediately to any juſtice of peace of the county where he is taken, who upon examination may diſcharge, bail, or commit him, as the caſe ſhall require.

(*u*) This is the ſame year with 49 *H.* 6. and is ſo printed in the yearbook.

And the bringing the offender either by the conſtable or private perſon to a juſtice of peace is moſt uſual and ſafe, becauſe a gaoler will expect a *Mittimus* for his warrant of detaining.

And thus far of arreſts.

CHAP. LI.

Of felony by voluntary eſcapes, *and touching felony by* eſcapes of felons.

HAving in the former chapter ſaid ſomewhat of arreſts, it remains that ſomewhat be ſaid touching thoſe felonies, that relate to the eſcape of perſons arreſted or impriſond.

And theſe eſcapes, are of three kinds, 1. By the perſon that hath the felon in his cuſtody, and this is properly an eſcape; and 2. When the eſcape is cauſed by a ſtranger, and this is ordinarily called a reſcue of a felon. 3. By the party himſelf, which is of two kinds, *viz.* 1. Without any act of force, and this is a ſimple eſcape, 2. With an act of force, *viz.* by breach of priſon.

As to the *firſt* touching an eſcape ſufferd by the perſon, that hath a felon in cuſtody, which is properly an eſcape; and this is of two kinds, voluntary or negligent.

And *firſt* concerning the *voluntary eſcape.*

A voluntary eſcape is when any perſon having a felon lawfully in his cuſtody voluntarily permits him to eſcape from it or go at large, and this is felony in caſe the perſon be impriſond for felony, and treaſon in caſe the perſon be impri-

ſond for treaſon, for the latter enough hath been ſaid before; touching the former in this place.

And altho Mr. *Stamford, Lib.* I. *cap.* 26, 27, 28, 29, 30, 31. hath collected almoſt all that can be well ſaid in this caſe, yet I ſhall proceed diſtinctly herein.

And therein I ſhall as near as I can obſerve this order.

1. I ſhall conſider who ſhall be ſaid a felon, whoſe eſcape makes a felony in him, that voluntarily ſuffers it. 2. What ſhall be ſaid a having of ſuch a felon in his cuſtody. 3. Who ſhall be ſaid a perſon lawfully having ſuch a felon in his cuſtody. 4. What ſhall be ſaid a voluntary eſcape of ſuch a felon out of his cuſtody. 5. Who ſhall be ſaid voluntarily to ſuffer ſuch a felon to eſcape. 6. What is the offenſe of ſuch a voluntary permiſſion of an eſcape, and where, and how puniſhable.

And tho I apply theſe particulars to a voluntary eſcape, yet many of them are applicable unto and uſeful for the learning of a negligent eſcape.

I. Who ſhall be ſaid a felon, whoſe voluntary eſcape is felony in him that ſo permits it.

If *A.* give *B.* a mortal wound, and before *B.* die the conſtable takes *A.* into cuſtody either with or without a juſtice's warrant, and then lets him voluntarily eſcape before *B.* is dead, and then *B.* dies, tho as between *A.* and *B.* or *A.* and the king, this is a felony from the ſtroke given, and the attainder of *A.* as to the forfeiture of his lands relates to the ſtroke, yet this is no felony in the conſtable, but only a miſdemeanor puniſhable by fine and impriſonment. 11 *H.* 4. 12. *b. Blownd. Com.* 258. *b.*

If *A.* be indicted for felony, and taken by *Capias*, or by the warrant of a juſtice, or by the conſtable, *&c.* and committed to priſon, and the gaoler ſuffer *A.* to eſcape voluntarily, this is the eſcape of a felon, tho *A.* be not attainted at the time of the eſcape, but the gaoler ſhall not be arraigned thereupon till after the attainder of *A. de quo infra.*

If a felony be in fact committed, and the conſtable takes *A.* upon ſuſpicion of felony, and after voluntarily ſuffers him to go at large, tho *A.* be not then indicted, yet this is a felonious

eſcape

escape in the constable, tho 42 *Assiz.* 5. be otherwise (*a*), yet 44 *Assiz.* 12. *Dy.* 99. *a.* 43 *E.* 3. 36. *a. accord.* (*b*)

And altho the constable be well assured after the arrest by him made, that *A.* was not the person that did it, yet he may not by the law discharge him, but must bring him before a justice, who may upon due circumstances discharge, bail, or commit him, as he sees cause; but the constable, if he discharge him, is finable.

But if the constable after the arrest finds certainly, that there was no felony committed, it is held he may discharge him both without danger of felony, (which is true,) and without any danger of fine and imprisonment, 13 *H.* 7. *Kelw.* 34. *a. b.* but then it is at his peril, if in truth there were a felony committed, and the party be guilty; *sed de his vide infra Dalt. cap.* 106. *p.* 271. *accords.* (*c*)

If *A.* be committed for petit larciny, and so it appear by the charge of his *Mittimus*, and the gaoler let him at large, this is a contempt, for which he shall be fined, but not felony in the gaoler; so if he were convicted of petit larciny before the escape. *Stamf. P. C. Lib.* I. *cap.* 27. *p.* 33. *b.* 8 *E.* 2. *Coron.* 430.

So if a man be originally committed for manslaughter *per infortunium* or *se defendendo*, or were convict only *se defendendo* or *per infortunium*, and afterwards the gaoler suffer him voluntarily to escape, it is no felony; but if the commitment or indictment were for manslaughter, tho in truth it were but *se defendendo*, yet *primâ facie* a voluntary escape is indictable as felony, tho *in eventu* it may fall out otherwise; *de quo infra.*

4 If

(*a*) That was the case of a negligent (not a voluntary) escape, and for that reason could not be felony, tho it is there given as a reason, why it should not be adjudged an escape, because the thief was not taken with the *mainoeuvre*, nor at the suit of the party, nor indicted of felony.

(*b*) This case is plainly the same with 44 *Assiz.* 12. and seems to be the case of a voluntary escape; it does not report any resolution of the court, but only says, that the bailiffs, who let the thief go, altho he were not indicted, were charged with an escape; and a *quære* is added at the end of the case: And as to the case in *Dyer*, that was not the case of the person arresting letting the thief go, but of a third person's rescuing him, and that is said to be felony, altho he was not indicted. See 1 *E.* 5. 16. *b.*

(*c*) *New Edit. p.* 511.

If *A.* be indicted of murder for the death of *B.* and pardoned or acquitted within the year, but left in gaol till the year be elapſed upon the ſtatute of 3 *H.* 7. *cap.* 1. that the wife may bring her appeal if ſhe pleaſe, and after that acquittal and within the year the gaoler ſuffer him voluntarily to eſcape, it is felony *primâ facie*, and the gaoler may be indicted for it as felony; but if the wife bring not her appeal within the year, or bringing her appeal *A.* is acquitted, the gaoler ought to be acquitted: *vide infra Plowd. Com.* 476. *b.*

If *A.* commit felony, and being convicted prays his clergy, and the court take time to adviſe upon it till another ſeſſions, and in the mean time he is left in gaol, as he ought to be, and the gaoler voluntarily ſuffer him to make his eſcape, this is felony in the gaoler, for ſuch a priſoner ſtands yet under a conviction of felony, and therefore is not by law bailable, but if the felon be retaken and hath his clergy, the felony in the eſcape is purged, and the gaoler is not indictable after, or if indicted before the clergy allowd, he is to be acquitted.

If *A.* be indicted of felony, and hath his clergy, but is continued for ſix months in cuſtody for his farther correction, according to the power given by the ſtatute of 18 *Eliz. cap.* 7. and the gaoler ſuffer him to eſcape voluntarily, it is a miſdemeanor puniſhable by fine and impriſonment, but no felony.

If a man be deliverd to the ordinary as a clerk convict upon his own confeſſion, or as a clerk attaint, in which caſes he ought not to be admitted to purgation, and the ordinary notwithſtanding admit him to his purgation, and ſet him at large, this at common law had been a miſdemeanor fineable, but it ſeems it had not been felony in the ordinary, for in thoſe times there was a pretenſion, that a clerk was not within the temporal juriſdiction; but the law concerning purgation is alterd ſince by the ſtatute of 18 *Eliz. cap.* 7. and other ſtatutes; *de quo infra* 21 *Aſſiz.* 12. 9 *E.* 4. 28.

Thus far what ſhall be ſaid a felony.

II. What ſhall be ſaid to be a having in cuſtody.

Every man is bound by law to purſue and take a felon, and if he make not purſuit, he is fineable.

But if *A.* commit a felony in the preſence of *B.* and *B.* never takes him nor attempts it, this is not felony in *B.* for *B.* had him not in his cuſtody.

So it is if *A.* commits a felony, and *B.* receives him knowing him to be a felon, and then *B.* voluntarily ſuffers him to depart, tho the receipt makes him acceſſary after, yet it is no eſcape by *B.* becauſe he never arreſted him, and ſo had him not in cuſtody. 9 *H.* 4. 11. (*d*)

If *A.* being acquit of felony judgment is given, that he ſhall go free paying his fees, tho the gaoler lets him go before fees paid, it is not felony, for by that judgment he is no longer in cuſtody as a felon. 21 *H.* 7. 17.

If the conſtable arreſt a man for felony, and bring him to the gaol, and the gaoler refuſe to receive him, yet in law he is in the cuſtody of the conſtable, and if he lets him go, he is chargeable in an eſcape. 10 *H.* 4. 7. *a. Eſcape* 8.

If *A.* have a franchiſe to have the cuſtody of felons in his gaol [for three days] (*e*), and then to deliver over to the ſheriff or county-goal, and after the three days he offers him to the county-gaol, and the gaoler do not receive him, he yet remains a priſoner to *A.* and if he ſuffer a voluntary eſcape it is felony, 27 *Aſſiz.* 27. yet in both theſe caſes the gaoler is puniſhable for not receiving the felon by 4 *E.* 3. *cap.* 10.

If *A.* arreſt *B.* of felony, and deliver him to the conſtable or to the vill, and they receive him, *A.* is diſcharged of the cuſtody, and the eſcape after is chargeable upon the conſtable or vill, and if the conſtable or vill deliver him to the ſheriff or his gaoler, and he receive him, the conſtable and vill are diſcharged of the cuſtody, and the ſheriff or gaoler is chargeable with the eſcape after. 3 *E.* 3. *Coron.* 328, 337.

As touching eſcapes without arreſts they belong not to this title of voluntary eſcapes; *ſed hæc vide infra & ſupra.*

If *A.* the ſheriff of *B.* hath a felon in gaol, and then *C.* is made ſheriff, till the priſoner be turned over by indenture to the new ſheriff, the cuſtody of him remains in *A.* and he or his

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(*d*) 24. *b.*

(*e*) Theſe words are not in the original *MS.* but yet are plainly ſuppoſed in the argument, and are mentiond in the caſe here quoted by our author, viz. 27 *Aſſiz.* 27.

his gaoler is chargeable for a negligent eſcape, and his gaoler chargeable for a voluntary eſcape.

If the bailiff of a franchiſe, that hath a gaol, hath the cuſtody of a felon, he is chargeable for his eſcape, and not the ſheriff or his gaoler.

III. Who ſhall be ſaid a perſon lawfully having the cuſtody of a felon: this hath been touched in the former ſection, but now ſhall be farther proſecuted.

If *A.* a meer private man knows *B.* to have committed a felony, he may thereupon arreſt him of felony, and he is lawfully in the cuſtody of *A.* till he be diſcharged of him by delivering him to the conſtable or common gaol; and therefore if he voluntarily ſuffer him to eſcape out of his cuſtody, tho he were no officer, nor *B.* indicted, it is felony in *A.*

So it is if a felony be in fact committed, and *A.* hath a probable cauſe to ſuſpect *B.* and accordingly ſuſpects and arreſts him, *B.* is lawfully in the cuſtody of *A.* for ſuſpicion of felony; and if he voluntarily lets him eſcape, it is felony in *A. in eventu, viz.* if *B.* prove really guilty of the felony.

And accordingly if *A.* deliver the party ſo arreſted to the conſtable's cuſtody, he is lawfully in his cuſtody, and if he ſuffer the eſcape voluntarily, it is felony *in eventu.* 44 *Aſſiz.* 12.

If a juſtice of peace make a *Mittimus* to the gaoler for felony with an unapt concluſion, as *till the juſtice give order for his delivery*, whereas it ſhould be *till he be deliverd by due courſe of law*, tho this warrant be not formal, yet the felon is lawfully in his cuſtody, and if he let him voluntarily eſcape, it is felony, for he is ſufficiently aſcertained of the crime with which he is charged.

And it ſeems to me, if the *Mittimus* be general and contain no certain cauſe, tho the gaoler is not bound to receive him upon ſuch a *Mittimus*, yet if he be acquainted what the crime is, for which he is committed, if he ſuffer him voluntarily to eſcape, it is felony.

For if a private perſon or a conſtable arreſt a man for felony, and carry him to the common gaol, (as he may do by law, 13 *E.* 4. 9. and the gaoler is bound to receive him by the

the ſtatute (*f*) of 4 *E.* 3. *cap.* 10.) if the conſtable or perſon, that delivers him, acquaints the gaoler it is for felony, it is at the peril of the gaoler if he lets him eſcape, and yet there is no *Mittimus* in that caſe, but a notice *ore tenus.*

The ſtocks is the priſon of the conſtable, and ſo long as he is in the ſtocks he is in the conſtable's cuſtody, and therefore if the conſtable wilfully let a felon eſcape out of the ſtocks and go at large, it is felony in the conſtable, unleſs it be to bring him to a juſtice, or to a ſafer or more convenient cuſtody.

IV. What ſhall be ſaid a voluntary eſcape of a felon in cuſtody, for it muſt be a *voluntary* eſcape to make felony.

If the priſoner be reſcued, or reſcue himſelf againſt the will of him, that hath him in cuſtody, this is no voluntary eſcape, nor is the gaoler, *&c.* puniſhable for the ſame.

If the priſon be fired, and the gaoler lets out the priſoners, there being no other means to ſave their lives, and uſes the beſt means he can by his officers and irons to keep them ſafe, and this without fraud, or if enemies force him to open the priſon doors, and he doth it to ſave his life, it excuſeth from felony.

And if it be done by rebels, tho this excuſe not the gaoler or ſheriff in civil actions, but he is liable to an action of debt or upon the caſe for the eſcape, becauſe the ſheriff hath his remedy over, yet it excuſeth the gaoler from felony and alſo from a fine, if it be *vis major, quam cui reſiſti poteſt.*

If a juſtice of peace bail a perſon not bailable by law, it excuſeth the gaoler, and it is not felony in the juſtice, but a negligent eſcape, for which he is fineable at common law, 25 *E.* 3. 39. (*g*), and by the juſtices of gaol-delivery by the ſtatute of 1 & 2 *P.* & *M. cap.* 13.

And the like in caſe of a ſheriff, under-ſheriff, conſtable, bailiff of a liberty bailing one, that is not by law bailable, it is not a voluntary eſcape, at leaſt unleſs done by deſign to deliver the priſoner for ever, but it is a negligent eſcape puniſhable

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(*f*) This ſtatute obliges the gaoler to receive felons by the delivery of the conſtables or townſhips, but ſays nothing as to the delivery by private perſons.

(*g*) In the laſt edition of the year-books, which is in this place miſpaged, it is 25 *E.* 3. 82. *a.*

niſhable at common law, or according to the ſtatute of 3 *E.* 1. *cap.* 15. by loſs of office, fine, and three years impriſonment.

And therefore I think, that if a juſtice of peace bail a perſon, that confeſſeth a felony before him, it is no voluntary eſcape, but fineable as above, for it is *error ſcientiæ*, 2 *R.* 3. 10. contrary to the opinion of *Crompt.* 39. *a. Dalt. p.* 276. (*b*)

If a gaoler voluntarily licence a felon to wander out of the bounds of the priſon and to return again, if the priſoner return again to the gaol before the gaoler be indicted, ſo as he be in cuſtody, it is held by ſome this will not excuſe a voluntary eſcape as to the point of felony, but certain it is that it is puniſhable as a miſdemeanor, and if he had never returned, it had been ſuch an eſcape, as would have been felony, tho perchance the licence were ſpecial to go out and come in at night. 22 *E.* 3. *Coron.* 242. 8 *E.* 2. *Coron.* 431. becauſe he cannot apportion his own wrong and breach of duty.

V. In whom the voluntary eſcape ſhall be.

In all civil cauſes the ſheriff is to be reſponſible, or the gaoler at election, as if the gaoler, or bailiff of a ſheriff ſuffer either voluntarily or negligently an eſcape of a perſon impriſond for debt, the ſheriff is chargeable with an action upon the eſcape, for the gaoler or bailiff is the ſheriff's officer or miniſter, and gives him ſecurity. 14 *E.* 3. *cap.* 10. 19 *H.* 7. *cap.* 10.

But if the gaoler being placed there by the ſheriff voluntarily ſuffer a felon in his cuſtody to eſcape, this in as much as it reacheth to life is felony only in the gaoler, that was immediately truſted with the cuſtody, not in the ſheriff.

But whether the eſcape was voluntary or negligent, yet the ſheriff may be indicted for it ſo as to ſubject him to a great fine and impriſonment for the offenſe of his gaoler, tho not to make him guilty of felony. *Dalt. cap.* 106. *p.* 273. (*i*), *Doctor* and *Student* 42. (*k*)

For the eſcape muſt be voluntarily permitted in him that permitted it, which could not be in the high ſheriff, tho it were ſuch in the gaoler, for he was not privy to it, and

(*b*) *New Edit. p.* 512. (*i*) *New Edit. p.* 509. (*k*) *Dialog.* 2. *cap.* 42.

therefore could not do it *felonicè*, but it was a negligent eſcape in him in truſting ſuch a perſon with the cuſtody of his priſoners, that would be falſe to his truſt, and therefore the ſheriff ſhall pay, but not corporally ſuffer for the miſcarriage of his gaoler.

But if the gaoler were a gaoler in fee, as anciently conſtables of caſtles were, the ſheriff ſhould not anſwer in any kind for the default of ſuch gaoler or conſtable; but now by the ſtatutes of 14 *E.* 3. *cap.* 10. and 19 *H.* 7. *cap.* 10. gaols of counties are rejoined to the counties.

But for eſcapes committed by gaolers of gaols in particular franchiſes, as the *Gate-houſe* at *Weſtminſter* belonging to the dean and chapter of *Weſtminſter*, eſcapes there permitted concern not the ſheriff, but the particular gaoler and lord of the franchiſe.

VI. How and in what manner, and before whom felonious eſcapes ſhall be determined, tried and adjudged.

It is to be known, that I may ſay it once for all, altho the felony for breaking of priſon may be heard, tried and determined before the felony, for which he was committed, as ſhall be ſaid; yet in caſe of a felony for the wilful eſcape or reſcue of a perſon committed to priſon for felony, tho the party, that voluntarily permits ſuch eſcape or reſcues the priſoner, may be indicted for theſe offenſes as felonies before the principal felony in him, that eſcapes or is reſcued, be tried, yet he ſhall not be arraigned or put upon his trial, till the principal be convicted or attainted; and the reaſon is, becauſe poſſibly the perſon eſcaping may be found not guilty, or if guilty, yet of ſuch a fact as is not capital, as of petit larciny, *ſe defendendo*, *per infortunium*, in which caſe the reſcuer or officer ought to be diſcharged; nay, if the principal perſon be only convict and not attaint, but hath his clergy, I think the gaoler or reſcuer ſhall never be put to anſwer to the eſcape or reſcue, but be diſcharged, as the acceſſary, where the principal hath his clergy, ſhall be diſcharged thereby, for the reſcuer and officer, that permits the eſcape, are a kind of acceſſaries.

But in theſe caſes the gaoler or reſcuer may be fined and impriſond for their miſdemeanor, but ſhall not be charged with felony, where the principal is diſcharged. 2 *Co. Inſtit. p.* 592.

Again, it is to be remembred, that there is a voluntary eſcape before indictment, and a voluntary eſcape of a party indicted of felony.

1. If the party that eſcapes were not indicted at the time of the eſcape voluntarily permitted, the indictment of the gaoler (and ſo in caſe of a reſcue) ought to ſurmiſe, that *de facto* a felony was committed, and that the perſon eſcaping was impriſond for that felony or ſuſpicion of it.

And I need not ſay this muſt be proved upon the evidence againſt the gaoler, for, as I ſaid before, the gaoler cannot be arraigned till the principal be attainted by verdict, confeſſion, or outlawry, and the record of ſuch attainder muſt be ſhewed or proved.

2. But if the party that eſcaped were indicted, and ſo taken by *Capias*, and then eſcape, tho, as I ſaid before, the gaoler or reſcuer cannot be arraigned and tried till the principal be attainted, yet the indictment for the eſcape or reſcue need not ſurmiſe a felony done, but only recite the ſubſtance of the indictment againſt him that eſcapes. 1 *E.* 3. 16. *b.* 2 *E.* 3. *Coron.* 158.

And the like law is in caſe of felony for breach of priſon. 2 *Co. Inſtit. p.* 590.

Again it is to be known, that as to the voluntary ſuffering of an eſcape or reſcuing of a felon, tho the felony be not within clergy, yet the eſcape or reſcue are within clergy, and tho the priſoner were indicted or attainted of ſeveral felonies, yet the eſcape or reſcue of ſuch a priſoner makes but one felony, and he ſhall be indicted but of one eſcape; but if *A.* and *B.* be indicted of one felony, and the gaoler voluntarily ſuffer both to eſcape, the gaoler may be indicted ſeverally for both.

The means of bringing an officer to judgment cannot be barely by the calling of the record of the priſoners over, as is uſually done in the king's bench, becauſe tho this may be a ſufficient cauſe to convict of a negligent eſcape, yet it cannot appear thereby, that it is voluntary; the marſhal or gaoler

gaoler may be fined upon a record thereof made, but he cannot be convict of a felony, 39 *H.* 6. 33. but there muſt be an indictment or preſentment of the felonious and voluntary eſcape.

And tho by the ſtatute of *Weſtm.* 1. *cap.* 3. (*l*) amercements upon the country for the eſcapes of felons cannot be ſet but by the juſtices in *Eyre*, or by the king's bench. 21 *Aſſiz.* 12. 27 *Aſſiz.* 27. or, as it ſeems, by juſtices of general *oyer* and *terminer*; yet the hearing and determining of eſcapes is at this day within the juriſdiction of juſtices of peace, or any other juſtices, by the ſtatutes of 1 *R.* 3. *cap.* 3. 31 *E.* 3. *cap.* 14.

And thus far concerning voluntary eſcapes of felons, where it is felony and where not.

In the next chapter I ſhall ſay ſomething concerning negligent eſcapes, tho this hath been before *cap.* 50 in part handled.

CHAP. LII.

Touching negligent eſcapes.

NEgligent eſcapes of felons are not felony, but puniſhable by fine upon the parties, that ſuffer them.

Theſe negligent eſcapes are of two kinds, 1. By an officer or ſome particular perſon or perſons, that hath a felon in cuſtody, 2. Or by vills or townſhips, whether the felon be taken and in cuſtody, or not taken.

I. Firſt as to negligent eſcapes by officers or particular perſons theſe things are conſiderable.

1. What ſhall be ſaid a negligent eſcape. 2. What the conviction of ſuch negligent eſcape. 3. What the puniſhment of it, and by whom.

(*l*) 2 *Co. Inſt.* 165.

1. As to the firſt of theſe, what ſhall be ſaid a negligent eſcape hath been partly before deſcribed, only ſome things I ſhall add.

If a priſoner for felony break the gaol, this ſeems to be a negligent eſcape, becauſe there wanted either that due ſtrength in the gaol, that ſhould have ſecured him, or that due vigilance in the gaoler or his officers to have prevented it, and therefore it is by law lawful for the gaoler to hamper them with irons to prevent their eſcape (*a*), and if this ſhould not be conſtrued a negligent eſcape, gaolers would be careleſs either to ſecure their priſoners, or to retake them that eſcape, if he ſhould in ſuch a caſe be exempt from pecuniary puniſhment; and we ſee by daily experience in civil caſes of men in execution or arreſted for debt, if they break priſon, the ſheriff is chargeable.

But if a private perſon arreſt a felon, and he eſcape by force from him without any default in him, tho the townſhip ſhall be amerced, as ſhall be ſaid, yet it ſeems it excuſeth the party, for he being a private perſon cannot raiſe power to take or detain a felon.

But if a ſheriff, bailiff, conſtable, or other officer hath the cuſtody of a priſoner bringing him to the gaol, it ſeems that a ſimple eſcape by the reſcue of the priſoner himſelf doth not excuſe him *a toto*, though it may *a tanto*, becauſe he may take ſufficient ſtrength to his aſſiſtance; but if he be reſcued before he be brought to gaol, *quere*, whether it be not an excuſe of an eſcape, as in caſe where a man is arreſted upon a meſne proceſs, and in carrying to gaol be reſcued, the return of the reſcue excuſeth the ſheriff, 39 *Eliz. C. B. Croke*, *n.* 22. *Conyer*'s caſe; but it is no excuſe if he be taken in

(*a*) And therefore this liberty can only be intended, where the officer has juſt reaſon to fear an eſcape, as where the priſoner is unruly or makes any attempt to that purpoſe, but otherwiſe, notwithſtanding the common practice of gaolers, it ſeems altogether unwarrantable, and contrary to the mildeneſs and humanity of the laws of *England*, by which gaolers are forbid to put their priſoners to any pain or torment; ſee *Co. P. C.* 34 & 35. *Cuſtodes gaolarum pœnam ſibi commiſſis non augeant, nec eos torqueant vel vexent, ſed omni ſævitiâ remotâ pietateque adhibitâ judicia debita exequantur, Flet. Lib.* 1. *cap.* 26. and the *Mirror of Juſtices, cap.* 5. §. 1. *n.* 54. ſays, *It is an abuſe that priſoners ſhould be charged with irons, or put to any pain before they be attainted of felony*; and lord *Coke* in his comment on the ſtatute of *Weſtm.* 2. *cap.* 11. is expreſs, *that by the common law it might not be done.* 2 *Inſtit.* 381.

execution and reſcued, for there the ſheriff ſhall be anſwerable notwithſtanding the reſcue, but it ſeems the reſcue is no excuſe in caſe of felony. 3 E. 3. *Coron.* 328, 337. (*b*)

And upon the ſame reaſon it is, that if a felon be attaint and be carried to execution, and be reſcued from the ſheriff, the ſheriff is puniſhable notwithſtanding the reſcue, for there is judgment given, and the ſheriff ſhould have taken ſufficient power with him, and therefore in that caſe the townſhip is not fineable: *vide* 27 *Aſſiz.* 54.

If a priſoner for felony be in gaol and eſcape, and the gaoler purſue after him, he may take him ſeven years after, tho he were out of his view, 13 E. 4. 9. *a.* 14 H. 7. 1. *a.* but that will not excuſe the gaoler from a negligent eſcape, tho it may excuſe *a tanto*; for if the gaoler hath once loſt the view of his priſoner, tho he take him after, it is an eſcape, but if he retake him upon a freſh purſuit, and hath ſtill the view of him, it is no eſcape, nor puniſhable. 8 E. 2. *Coron.* 400. 22 E. 3. *Coron.* 236. *M.* 28 E. 3. *Rot.* 32. *Rex. Hertf. Caſus Abbatis Sancti Albani. M.* 45 E. 3. *Rot.* 17. *in dorſ. Rex. Eſſex.*

But if a man be arreſted for felony, and in bringing to gaol by the ſheriff's bailiff or conſtable he makes his eſcape, and they follow him and keep the view of him, but cannot take him without killing him, whereby he is kild in the purſuit, yet the ſheriff or conſtable, or townſhip, that let him eſcape, ſhall be fined for the eſcape, becauſe tho the party be kild in the freſh purſuit, he cannot now be brought to judgment, and yet by his flight, if preſented by the coroner, he forfeits his goods. 3 E. 3. *Coron.* 328 and 346.

If a felon eſcape out of the gaol by negligence, tho the gaoler be fined for it, he may retake the felon at any time after, for the felon ſhall not take the advantage of his own wrong, or the gaoler's puniſhment, but his retaking ſhall not diſcharge the gaoler's fine, and ſo is the book to be intended. 13 E. 4. 9. *a.*

2. Touch-

(*b*) Theſe caſes, as alſo *Coniers's* caſe here mentiond, prove nothing particularly as to a reſcue, but only in general, that a ſheriff ſhall be liable in caſe of an eſcape.

2. Touching the conviction of a negligent eſcape.

The proper way of conviction is by preſentment and trial thereupon.

Yet where the priſoners be of record in a court, if the gaoler being called cannot give an account where a priſoner is, this is a conviction of an eſcape, but ſeems not to be preſently a conviction of a *voluntary* eſcape, unleſs the gaoler confeſs it: *vide* 27 *H.* 6. 7. 39 *H.* 6. 33. ſo in ſome caſes the coroner's roll is a conviction of an eſcape, *vide* 3 *E.* 3. *Coron.* 352. ſo if the dozeners preſent a felon taken and deliverd to the ſheriff by the vill, but ſhew not what ſheriff. 3 *E.* 3. *Coron.* 345. (*c*)

Where an officer is to be charged either with a voluntary or negligent eſcape, the bare preſentment of the eſcape by the grand inqueſt or the dozeners in *Eyre*, or upon a commiſſion of *Oyer* and *Terminer*, or in the king's bench, is not alone ſufficient to convict the officer, becauſe upon his conviction, tho but of a negligent eſcape, he is to be fined.

But if the dozeners in *Eyre* or in the king's bench preſent the eſcape of a felon, whereby the vill is to be amerced, becauſe this is but an amercement, and the juſtices may [not in this caſe (*d*)] ſet a fine but an amercement, *de minimis non curat lex*, and therefore the preſentment is not traverſable: *vide* 3 *E.* 3. *Coron.* 291. *& ibidem* 3 *E.* 3. *Coron.* 328, 346. *Stamf. P. C. Lib.* I. *cap.* 33. *fol.* 35. *b.*

An eſcape is preſentable in a leet, but they cannot ſet a common fine or amercement there, but it ought to be ſent to the next *Eyre &c.* or may be removed into the king's bench by *Certiorari*, and there the common fine or amercement ſet; and this by the ſtatute of *Weſtm.* 1. *cap.* 3.

3. As to the puniſhment of a negligent eſcape by an officer or other that hath the felon in cuſtody, it is by fine and impriſonment.

If

(*c*) The words of the book are, "When the dozen preſent, that a felon "is taken for felony and delivred to the "ſheriff, they adjudge it for an eſcape "in *Eyre*, if they do not ſay to what "ſheriff by name, for a man may inquire "his rolls to ſee whence the priſoner "comes, *&c.* and if they do not find in "the ſheriff's roll, that he was charged "with him, or if they do not find how "he got out of his cuſtody according to "the law of the land, it ſhall be adjudged an eſcape in the ſheriff.

(*d*) Theſe words are wanting in the *MS.* but the ſenſe of the place ſeems plainly to require them.

If the felon be attainted it is ſaid, that the fine is to be an hundred pounds, and if he be only indicted, then an hundred ſhillings, *Stamf. P. C. p.* 35. but the fine in truth is more or leſs according to the quality of the offenſe, and ſometimes of the offender: *vide* 3 *E.* 3. *Coron.* 370. a biſhop fined one hundred pounds for an eſcape.

Coiã in Scaccario M. 36 *E.* 3. *n.* 5. The conſtable of a caſtle under the duke of *Lancaſter* permitted a negligent eſcape; It was ruled 1. That in default of the conſtable the duke of *Lancaſter*, that put him in, ſhould be fined. 2. That tho the duke were dead, yet his executors ſhould be fined (*e*), and they were fined five pounds for negligent eſcape.

II. I come to thoſe fines, that are for eſcapes of felons either before or ſometimes after arreſt.

And this is that, which is ſet upon vills, towns, cities, and ſometimes upon hundreds and counties, and is uſually called *eſcapium*, and thoſe, that have franchiſes to be quit *de murdro, latrocinio, eſcapiis*, are intended of thoſe common fines ſet upon vills or hundreds for thoſe offenſes, and then he, that hath ſuch a liberty granted by the king to be quit *de eſcapiis*, hath a diſcharge for the rate or portion of ſuch a common fine or amercement, that comes to his ſhare; and this franchiſe or liberty generally granted to be quit *de eſcapiis* extends not to voluntary eſcapes by officers or others, but as I ſaid, to the rate or portion chargeable upon them by ſuch common fine or amercement for negligent eſcapes.

If a murder, manſlaughter or killing of a man *ſe defendendo* be committed in a vill not incloſed in the day-time, and the murderer, *&c.* be not taken, the vill ſhall be amerced, altho it be done after ſun-ſet, before day-light be gone. 22 *E.* 3. *Coron.* 238. 3 *E.* 3. *Coron.* 293, 302. 3 *H.* 7. *cap.* 1.

And if the murder be committed in a town encloſed in the day or night, and the murderer or manſlayer eſcape, the town ſhall be amerced, becauſe by the ſtatute of *Winchеſter* they ought to keep their gates ſhut from ſunſet to ſunriſing. 3 *E.* 3. *Coron.* 299. 3 *H.* 7. *cap.* 1.

If

(*e*) See 2 *Co. Inſtit.* 380.

If a felony be committed in a vill, and they take the felon and commit him to four men to carry him to gaol, and they ſuffer him to eſcape, the vill ſhall be amerced. 3 *E.* 3. *Coron.* 346.

If a felony be committed in a vill, and the felon taken by them of the vill, and he eſcape from them to the church of the ſame vill, and from thence before abjuration he eſcapes again, the vill ſhall be amerced for two eſcapes at common law, for they ſhould have kept him in the church till abjuration, *&c.* 8 *E.* 2. *Coron.* 422.

But if a perſon attaint, as they are carrying him to execution, eſcape to a church, and from thence make an eſcape, the vill were not amerceable, becauſe he could not abjure being attaint, and therefore the vill were not bound to watch him, 27 *Aſſiz.* 54. *vide Rot. Parl.* 45 *E.* 3. *n.* 25. 50 *E.* 3. *n.* 183. But now abjuration and ſanctuary are ouſted (*f*), and with it much of this old learning of eſcapes is antiquated.

If a priſoner for ſuſpicion of felony be brought to the hundred-court, and the court grant him liberty to ſeek his voucher or warrant, and he eſcape, the hundred ſhall be amerced. 3 *E.* 3. *Coron.* 316. and ſo it is if a manſlaughter be committed out of any vill. *Stamf. P. C.* 34. *a.*

If the vill anſwer not the amercement for an eſcape, the hundred ſhall be diſtrained, and if the hundred anſwer not, the county ſhall be charged therewith and diſtrained. *Stamf. P. C. p.* 34. *b.*

And thus far touching eſcapes both voluntary and negligent.

(*f*) By 21 *Jac. cap.* 28. §. 7.

CHAP. LIII.

Concerning reſcues *of priſoners in cuſtody for felony.*

RESCUE of a perſon impriſond for felony is alſo felony by the common law.

To make a reſcue a felony, 1. It is neceſſary that the felon be *in cuſtody, or under arreſt* for felony, and therefore if *A.* hinder an arreſt, whereby the felon eſcapes, the townſhip ſhall be amerced for the eſcape, and *A.* ſhall be fined for the hindrance of his taking; but it is not felony in *A.* becauſe the felon was not taken. 3 *E.* 3. *Coron.* 333. *Stamf. P. C. p.* 31. *a.*

2. Again, to make a reſcue felony the party reſcued muſt be under cuſtody *for felony or ſuſpicion of felony*, and it is all one; whether he be in cuſtody for that account by a private perſon, or by an officer or warrant of a juſtice, for where the arreſt of a felon is lawful, the reſcue of him is a felony.

It ſeems that it is neceſſary, that he ſhould have knowledge that the perſon is under arreſt for felony, if he be in the cuſtody of a private perſon.

But if he be in the cuſtody of an officer as conſtable or ſheriff, there at his peril he is to take notice of it, and ſo it is if there be felons in a priſon, and *A.* not knowing of it breaks the priſon and lets out the priſoners, tho he knew not that there were felons there, it is felony, and if traitors were there, it is treaſon. *P.* 16 *Car.* 1. *Croke, p.* 583. *Benſted's* caſe *per omnes juſticiarios.*

A return of a reſcue of a felon by the ſheriff againſt *A.* is not ſufficient to put him to anſwer for it as a felony without indictment or preſentment by the ſtatute of 25 *E.* 3. *cap.* 4. 1 *H.* 7. 6. *a. per curiam*, 2 *E.* 3. 1. *Coron.* 149.

As in caſe of an eſcape, ſo in caſe of a reſcue, if the party reſcued be impriſond for felony, and be reſcued before indictment, the indictment muſt ſurmiſe a felony done as well as an impriſonment for felony or ſuſpicion thereof; but if the party be indicted and taken by a *Capias* and reſcued, then there needs only a recital that he was indicted *prout*, and taken and reſcued.

But tho the reſcuer may be indicted before the principal be convicted and attainted, yet he ſhall not be arraigned or tried before the principal be attaint for the reaſon given, *cap.* 51.

The reſcuer of a priſoner for felony, tho not within clergy, yet ſhall have his clergy.

Vide plus capite proximo, for many things there ſaid are applicable to the caſe of a reſcue.

CHAP. LIV.

Concerning eſcapes and breach of priſon *by the party himſelf that is impriſond for felony.*

AT common law it was held, that if any impriſond for a miſdemeanor, tho not felony, had broke the priſon and eſcaped, it had been felony. *Bract. Lib.* II. (*a*), *Stamf. P. C. p.* 30. *b.* 2 *Co. Inſtit. p.* 589. (*b*)

But

(*a*) This ſhould be *Lib.* III. *tract.* 2. *de Corona*, *cap.* 9. *f.* 124. *a.* in this place *Bracton* carries the matter very far, for he ſays, tho the party were innocent, and had only *conſpired* to eſcape, he was *ultimo ſupplicio puniendus.*

(*b*) But this ſeverity is complained of as an abuſe, *Mirror*, *cap.* 3. §. 1. and it was the opinion of *Billing* chief juſtice and the reſt of the judges, 1 *H.* 7. 6. *a.* that a reſcue of a felon was felony at common law, but not in the perſon himſelf, till the ſtatute of 1 *E.* 2. this lord *Coke* ſays muſt be intended, where others break the priſon without his privity. 2 *Inſt.* 589.

But by the ſtatute of 1 *E.* 2. *de frangentibus priſonam* the ſeverity of the common law is moderated, *viz. Nullus de cætero, qui priſonam fregerit, ſubeat judicium vitæ vel membrorum pro fractione priſonæ tantum, niſi cauſa, pro quâ captus & impriſonatus fuerit, tale judicium requirit, ſi de illâ ſecundum legem & conſuetudinem terræ fuerit convictus, licèt temporibus præteritis aliter fieri conſuevit.*

Upon this ſtatute therefore to make a felony by breach of priſon theſe things muſt concur: 1. The party muſt be in priſon. 2. He muſt be in priſon for felony. 3. He muſt break that priſon. Many of theſe things have been diſcuſſed before. I ſhall reſume and add what ſhall be neceſſary for the explication of this felony.

I. What is a priſon, and who ſhall be ſaid a perſon in priſon.

If a man be impriſond for felony in the priſon of a franchiſe, and breaks and eſcapes, this is a breaker of priſon, and it is as to this purpoſe the king's priſon (*c*), tho the franchiſe or profit be the lord's. 2 *E.* 3. 1 *Coron.* 149. *Stamf. P. C.* 31. *a.* 2 *Co. Inſtit.* 589.

So at common law when ſanctuary was in uſe, if a felon had eſcaped to a church, and there had been watched by the vill where the church is, and he had broken the church and eſcaped, this had been a felony within this ſtatute. *Stamf. P. C. p.* 30. *b.* 3 *E.* 3. *Coron.* 290.

Whether the breach of the priſon of the ordinary by a clerk convict or attaint before purgation had been felony, *vide Stamf. P. C. p.* 31, 32. but that learning is now antiquated, becauſe by the ſtatute of 18 *Eliz. cap.* 7. the priſoner is not now deliverd to the ordinary; and therefore I ſhall not farther examine it.

(*c*) *Stamford* in the place here mentiond thinks it is not the king's priſon, and therefore at common law the breaking of it would not be felony, but by the ſtatute of 1 *E.* 2. it matters not, whether it be the king's priſon or no, for it ſpeaks *de priſona* generally, and not *de priſona noſtra*; however, as it muſt be intended a legal priſon, which cannot be without a grant from the crown, our author's conſtruction is very reaſonable, that all ſuch priſons ſhould be taken as to this purpoſe to be the king's priſons.

If a perſon be taken for felony, and put in the ſtocks and break it, this is a breaking of priſon, and felony within the law. *Dy.* 99. *a.* 2 *Co. Inſt.* 589. *Stamf. P. C. p.* 30. *b.*

So it is if the conſtable or any other ſecure a felon in the houſe of him that makes the arreſt, or in the houſe of any other, and he break it and eſcape, it is felony.

Yet farther, if *A.* arreſt *B.* for felony or ſuſpicion of felony, there being *de facto* a felony committed, and being in the hands of *A.* he violently reſcueth himſelf and eſcapeth; this is a breach of priſon and a felony, for ſo are the words of my lord *Coke*, 2 *Inſtit.* 589. "*Nota*, he that is in the "ſtocks or under lawful arreſt is ſaid to be in priſon, tho "he be not *infra carceris parietes.*" And *Stamford ubi ſupra p.* 30. *b. Et* nota *quant a ceo que cheſcun que eſt ſoubs arreſt pour felony eſt priſoner auxy bien hors de gaol come deins, iſſint que ſil ſoit lorſque in cippes in le haut ſtreet ou hors de cippes in le poſſeſſion d' aſcun, que lui aver arreſt, & fait eſcape, ceo eſt debruſement de priſon in le priſoner*, which muſt be intended, as it ſeems, of a violent eſcape, *viz.* reſcuing himſelf out of cuſtody.

II. What ſhall be ſaid a being in priſon for ſuch a cauſe, as requires *judicium vitæ vel membrorum.*

It ſeems it is intended only of capital offenſes, as felony, and therefore if a man be committed for petit larciny or homicide *ſe defendendo* or *per infortunium* and break priſon, this is not felony, for the principal offenſe *non requirit tale judicium.* 2 *Co. Inſtit.* 590.

But if the commitment expreſs larciny above value or manſlaughter, tho *de facto* it were but petit larciny, or *per infortunium* or *ſe defendendo*, and poſſibly would appear ſo upon the evidence, yet this eſcape will be felony.

Touching my lord *Coke*'s opinion of the form of the *Mittimus*, that it muſt particularly expreſs the nature of the felony, and muſt have an apt concluſion I have ſaid enough before; I think it is ſufficient if it be generally for felony, altho it want that regular concluſion, (*till he be deliverd by due courſe of law,*) yet theſe defaults will not excuſe the breach of priſon from felony, but poſſibly if it expreſs no cauſe, the

caſe may be otherwiſe, becauſe the ſubſtance of the *Mittimus* muſt be recited in the indictment.

For it is very plain, that antiently there were more felons committed to the common gaol without *Mittimus* in writing than were with it; ſuch were all the commitments by conſtables, watchmen, and private perſons arreſting for felony and bringing to the common gaol, and *Mittimus's* were not of ſo antient a date as juſtices of peace, and they were not before 1 *E.* 3. (*d*), and yet breach of priſon by felons was felony even from 2 *E.* 1. and not only from 1 *E.* 2.

It is therefore enough if the gaoler have a ſufficient notification of the nature of the offenſe, for which he was committed, and the priſoner of the offenſe, whereof he was arreſted, and commonly they know their own guilt, if they are guilty, without much notification.

And again by what hath been ſaid breach of priſon is not only, where the felon is formally committed to gaol by a *Mittimus*, but if he be put in the ſtocks, kept in the conſtable's houſe, nay, under the cuſtody of him that makes the arreſt, and he break priſon, it is a felony, tho in theſe caſes there neither are nor can be *Mittimus's*.

If *A.* arreſt *B.* for ſuſpicion of felony, and carry him to the common gaol, and there deliver him, as he may do, 13 *E.* 4. 9. *a.* 4 *E.* 3. *cap.* 10. and he break priſon, if he be indicted upon it there muſt be an averment in the indictment, that there was a felony committed, and that *A.* having probable cauſe did ſuſpect *B.* and arreſted him and committed him, and that he broke the priſon, and this muſt be all proved upon the evidence.

But if *B.* be indicted or appealed and taken by *Capias*, and committed and break priſon, there needs no averment or proof, that a felony was done, but only, that there was an indictment or appeal, and a *Capias* thereupon, becauſe all appears by matter of record. 2 *Co. Inſtit.* 590.

But a lawful commitment may be for ſuſpicion of felony, and this is within this ſtatute, yet no perſon can be indicted barely

(*d*) See 1 *E.* 3. *cap.* 16.

barely of ſuſpicion of felony, but of the felony itſelf. 43 *E.* 3. *Coron.* 454. 44 *Aſſiz.* 12. 2 *Co. Inſtit.* 592.

If a felony be made by act of parliament ſubſequent to 1 *E.* 2. and a perſon be committed for ſuch a felony and break priſon, yet this is felony. 2 *Co. Inſtit.* 592.

III. What ſhall be ſaid a breaking of priſon by a perſon committed for felony to make a felony.

If the priſon be fired by accident, and there be a neceſſity to break priſon to ſave his life, this excuſeth the felony, but if the priſon were fired by the priſoner himſelf, or by his procurement, the breaking to ſave his life is nevertheleſs felony, for it was a neceſſity of his own creating. 2 *Co. Inſtit.* 590.

If the gaoler ſet open the priſon doors and the felon eſcape, this may be a felony in the gaoler, but is no breach of priſon to make felony in the priſoner.

If *A.* be arreſted or impriſond for felony, and *B.* and others without the conſent of *A.* reſcue *A.* this is felony in the reſcuers, but not felony in *A.* but if *A.* were of confederacy with *B.* to do it, then it is felony in *B.* as a reſcue, and in *A.* as a breach of priſon.

And ſo it is if *B.* had broke the priſon doors, and they being open *A.* had gone away, this had been felony in *B.* but not felony in *A.* unleſs it were done by his confederacy or procurement, for *A.* did not actually break priſon. 2 *Co. Inſtit.* 589. 1 *H.* 7. 6. *a.*

IV. Touching the proceeding for felony by breach of priſon.

A. is committed for felony, or ſuſpicion thereof, and breaks priſon, he may be indicted, arraigned, convicted, and have judgment for the eſcape, altho the principal felony be not tried, and he may be not guilty of the felony, and ſo it differs from the caſe of a reſcue or eſcape before, and the reaſon is, becauſe here it is the ſame perſon, there they are divers, and therefore in the latter caſe the principal felony ſhall be firſt tried. 2 *Co. Inſtit.* 592.

And yet I hold, that if *A.* be indicted of felony and committed, and then breaks priſon, and then be arraigned of

the

the principal felony and found not guilty, now *A.* ſhall never be indicted for the breach of priſon, or if indicted for it before the acquittal, and then he is acquitted of the principal felony, he may plead that acquittal of the principal felony in bar to the indictment for the felony for breach of priſon.

And ſo it was pleaded by myſelf in the caſe of one Mrs. *Samford*, who was ſeverely proſecuted by the earl of *Leiceſter* upon a ſuſpicion that ſhe had ſtolen his jewels, for tho while the principal felony ſtood untried, it ſtood indifferent whether ſhe were guilty of the principal felony, or rather the breach of priſon was a preſumption of the guilt of the principal offenſe, yet now it be cleared, that ſhe was not guilty of the felony, ſhe is now in law as a perſon never committed for felony, and ſo her breach of priſon is no felony.

The felony of breach of priſon is a felony within clergy, tho the principal felony for which the party was convicted were out of clergy, as robbery, or murder.

CHAP. LV.

Of principals and acceſſaries in felony, and firſt of acceſſaries before the fact.

HAving gone through the conſiderations of the offenſes of treaſons, and alſo of felonies at the common law, it will be ſeaſonable in this place to conſider of thoſe different relations of principals and acceſſaries, whereof tho much hath occaſionally been mentiond, yet I ſhall now proceed to the diſcuſſion of this matter diſtinctly and apart, and ſhall put together all the learning, that occurs to me concerning this matter.

In

In the higheſt capital offenſe, namely high treaſon, there are no acceſſaries neither before nor after, for all conſenters, aiders, abetters, and knowing receivers and comforters of traitors are all principals, as hath been ſaid, 3 *H.* 7. 10. *a. Stamf. P. C. p.* 40. *a. Co. P. C. p.* 20. *136.*

But yet as to the courſe of proceeding it hath been and indeed ought to be the courſe, that thoſe, who did actually commit the very fact of treaſon, ſhould be firſt tried before thoſe, that are principals in the ſecond degree, becauſe otherwiſe this inconvenience might follow, *viz.* that the principals in the ſecond degree might be convicted, and yet the principals in the firſt degree may be acquitted, which would be abſurd: *vide Somervill's* caſe (*a*) before *cap.* 22. *p.* 238.

In caſes that are criminal but not capital, as in treſpaſs, mayhem, or *præmunire*, there are no acceſſaries, for all the acceſſaries before are in the ſame degree as principals, *Stamf. Lib.* I. *cap.* 48. *& libros ibi*; and acceſſaries after by receiving the offenders cannot be in law under any penalties as acceſſaries, unleſs the acts of parliament, that induce thoſe penalties, do expreſly extend to receivers or comforters, as ſome do.

Note, the word *maintainers* in the ſtatute of 27 *E.* 3. *cap.* 1. and 16 *R.* 2. *cap.* 5. denotes the maintainers of the offenſe, and not (as it ſeems) of the parties.

It remains therefore, that the buſineſs of this title of principal and acceſſary refers only to felonies, whether by the common law, or by act of parliament.

As to felonies by act of parliament, regularly if an act of parliament enact an offenſe to be felony, tho it mention nothing of acceſſaries before or after, yet virtually and conſequentially thoſe, that counſel or command the offenſe, are acceſſaries before, and thoſe, that knowingly receive the offender, are acceſſaries after, as in the caſe of rape made felony by the ſtatute of *Weſtminſt.* 2. *cap.* 34. (*b*), *Stamf. P. C. Lib.* I.

(*a*) 1 *And.* 109. But it was ruled in that caſe, that upon that branch of treaſon, which relates to the compaſſing the death of the king, there is no need that the principal in the firſt degree, (*viz.* he who undertook to do the act) ſhould be firſt tried, for the movers or procurers are guilty of compaſſing the death of the king, altho he, that was procured, ſhould never aſſent thereto.

(*b*) 2 *Co. Inſtit.* 434.

cap. 47. 11 *H.* 4. 14. in caſe of multiplication, *Co. P. C. cap.* 20. tho *Dy.* 88. makes it a *quære.*

But if the act of parliament, that makes the felony, in expreſs terms comprehend acceſſaries before, and make no mention of acceſſaries after, namely receivers or comforters, there it ſeems there can be no acceſſaries after, for the expreſſion of procurers, counſellers, abetters, all which import acceſſaries before, make it evident, that the law-makers did not intend to include acceſſaries after, which is an offenſe of a lower degree than acceſſaries before, as the ſtatute of 8 *H.* 6. *cap.* 12. for ſtealing of records, the ſtatute of 33 *H.* 8. *cap.* 8. for witchcraft, *&c. Stamford's P. C. ubi ſupra.*

It is true my lord *Coke, P. C. cap.* 19. *p.* 72, 73. denies the opinion of *Stamford,* and affirms, that tho the ſtatute of 8 *H.* 6. *cap.* 12. mention only acceſſaries before, yet virtually and conſequentially acceſſaries after are included, as well as in felonies at common law; but he neither allegeth any reaſon or authority for that opinion, and therefore the authorities being equal the greater reaſon ſeems to be with *Stamford's* opinion, *Expreſſum facit ceſſare tacitum,* and no weight can be laid upon the ſtatute of 3 *H.* 7. *cap.* 2. for that in expreſs terms makes acceſſaries before and after to ſtand as principals.

And upon the ſame reaſon it is, that many of theſe acts of parliament mentiond before *cap.* 22. *p.* 236. that make certain offenſes, their counſellers, abetters, and procurers to be treaſon, do not extend to make receivers guilty of treaſon, tho if the act had been general, that ſuch an offenſe ſhall be treaſon, it had conſequentially made knowing receivers, as well as abetters, guilty of treaſon: *vide Co. P. C. cap.* 64. *p.* 138.

Tho generally an act of parliament creating a felony renders conſequentially acceſſaries before and after within the ſame penalty, yet the ſpecial penning of the act of parliament in ſuch caſes ſometimes varies the caſe.

The ſtatute of 3 *H.* 7. *cap.* 2. for taking away maidens, *&c.* makes the offender, and the procuring and abetting, yea and wittingly receiving alſo to be all equally principal felonies, and excluded of clergy.

Again, the ſtatute of 27 *Eliz. cap.* 2. makes the coming in of a jeſuit treaſon, the receiving or relieving of him felony, the contributing of money to his relief a *præmunire*, ſo that acts of parliament may diverſify the offenſes of acceſſary or principal according to the various penning thereof, and ſo have done in many caſes.

And thus much as to acceſſaries to felonies made by act of parliament, which being general directions may be applicable almoſt to all caſes.

I come to conſider of principals and acceſſaries in felony, and their differences among themſelves, and with relation to felonies at common law.

By what hath been formerly deliverd principals are in two kinds, principals in the firſt degree, which actually commit the offenſe, principals in the ſecond degree, which are preſent, aiding, and abetting of the fact to be done.

So that regularly no man can be a principal in felony, unleſs he be preſent, unleſs it be in caſe of wilful poiſoning, wherein he, that layeth or infuſeth poiſon with intent to poiſon any perſon, and the perſon intended or any other take it in the abſence of him that ſo layeth it, yet he is a principal, and he, that counſelleth or abetteth him ſo to do, is acceſſary before. *Co. P. C. cap.* 64. *p.* 138.

Who ſhall be ſaid preſent, aiding and abetting in caſe of felony hath been ſufficiently declared in *cap.* 34. in caſe of murder, in *cap.* 48. in caſe of burglary, in *cap.* 46. in caſe of robbery, and need not again be repeated.

Acceſſaries again are of two kinds, acceſſaries before the fact committed, and acceſſaries after.

An acceſſary before is he, that being abſent at the time of the felony committed doth yet procure, counſel, command, or abet another to commit a felony, and it is an offenſe greater than the acceſſary after; and therefore in many caſes clergy is taken away from acceſſaries before, which yet is not taken away from acceſſaries after, as in petit treaſon, murder, robbery, and wilful burning, by 4 & 5 *P. & M. cap.* 4.

Thoſe offenſes, which in the conſtruction of law are ſudden and unpremeditated, cannot have any acceſſaries before,

fore, as killing a man *per infortunium*, *ſe defendendo*, or manſlaughter.

And therefore, if *A.* be indicted of murder, and *B.* as acceſſary before, if the jury find *A.* guilty only of manſlaughter, there ſhall be no inquiry of *B.* but he ſhall be forthwith diſcharged, becauſe bare homicide is always ſudden, for if it were premeditated, it had been murder and not barely homicide, *Bibith*'s caſe (*c*), but there may be an acceſſary after.

Again, the exility of the offenſe, tho it be felony, yet becauſe it is not capital excludeth acceſſaries before or after, and therefore in petit larciny there can be no acceſſary, *Anne Laſſington*'s caſe, *P.* 42 *Eliz. B. R.* (*d*); and this is alſo the reaſon, why there can be no acceſſary neither before nor after in manſlaughter *per infortunium*, or *ſe defendendo*, becauſe there is no judgment of death in that caſe.

That which makes an acceſſary before is command, counſel, abetment, or procurement by one to another to commit a felony, when the commander or counſeller is abſent at the time of the felony committed, for if he be preſent, he is principal.

And therefore words, that ſound in bare permiſſion, make not an acceſſary, as if *A.* ſay he will kill *J. S.* and *B.* ſay you may do your pleaſure for me, this makes not *B.* acceſſary. 21 *H.* 7. 36, 37. *Cromp.* 41. *b.*

If *A.* hire *B.* to mingle or lay poiſon for *C.* *B.* doth it accordingly, and *C.* is poiſoned, *B.* tho abſent, is principal, *A.* is acceſſary; but if *A.* were preſent at the mingling or laying of the poiſon, tho both were abſent at the taking of it, yet both are principal, for they are both equally acting in the poiſoning.

But if *A.* buy the materials of the poiſon, knowing and conſenting to the deſign, and deliver them to *B.* to mingle and apply it, or lay it in the abſence of *A.* here it ſeems *A.* is only acceſſary before: *quod vide Co. P. C. cap.* 7. *p.* 50. *Franklin*'s caſe. (*e*)

If *A.* command or counſel *B.* to commit felony of one kind, and *B.* commits a felony of another kind, *A.* is not acceſſary,

(*c*) 4 *Co. Rep.* 43. *b.* (*d*) *Cro. Eliz.* 550. (*e*) *State Tr. Vol.* I. *p.* 329.

ceſſary, as if *A.* command *B.* to ſteal a plate, and *B.* commits burglary to ſteal the plate, *A.* is acceſſary to the theft, but not to the burglary. *Co. P. C. cap.* 7. *p.* 51.

If *A.* command *B.* to take *C.* and *B.* takes *C.* and robs him, *A.* is not acceſſary to the robbery.

But if *A.* command *B.* to beat *C.* and *B.* beats *C.* ſo that he dies, *A.* is acceſſary, becauſe it may be a probable conſequence of his beating, 3 *E.* 3. *Coron.* 314. *Stamf. P. C. Lib.* I. *cap.* 45. *fol.* 41. *a.* the like it is if he command *B.* to rob him, and in robbing him *B.* kills him, *A.* is acceſſary to the murder. *Plowd. Com.* 475. *Crompt.* 43. *b.*

A. commands *B.* to burn the houſe of *C.* *B.* kills, robs, or ſteals from *C.* *A.* is not acceſſary, for it is an offenſe of another kind; ſo if *A.* commands *B.* to ſteal the horſe of *C.* and he ſteals his cow, *A.* is not acceſſary. *Plowd. Com.* 475. *Saunder*'s caſe.

But if *A.* command *B.* to ſteal generally from *C.* then he is acceſſary to any kind of theft from *C.* tho it were done by robbery, for that varies the offenſe only in degree.

A. commands *B.* to poiſon *C.* *B.* kills him with a ſword, yet *A.* is acceſſary, for the ſubſtance of the thing commanded was the death of *C.* and the differing in the manner of its execution from the command doth not excuſe *A.* from being acceſſary.

But if *A.* command *B.* to kill *C.* and *B.* by miſtake kills *D.* or elſe in ſtriking at *C.* kills *D.* but miſſeth *C.* *A.* is not acceſſary to the murder of *D.* becauſe it differs in the perſon. *Co. P. C. cap.* 7. *p.* 51. *Plowd. Com.* 475. *Saunder*'s caſe.

A. gets *B.* with child, and before the birth counſels *B.* to kill it, the child is born, *B.* murders it, *A.* is acceſſary to the murder, yet at the time of the counſel given the child was not *in rerum naturâ.* 2 *Eliz. Dy.* 186. *a.*

A. lets out a wild beaſt, or imploys a madman to kill others, whereby any is killed, *A.* is principal in this caſe, tho abſent, becauſe the inſtrument cannot be a principal. *Dalt. cap.* 108. (*f*)

(*f*) *New Edit. p.* 529.

* *A.* commands *B.* to kill *C.* but before the execution thereof *A.* repents and countermands *B.* and yet *B.* proceeds in the execution thereof, *A.* is not acceſſary, for his conſent continues not, and he gave timely countermand to *B. Co. P. C. cap.* 7. *p.* 51. *Plowd. Com.* 474. *Saunder's* caſe; but if *A.* had repented, yet if *B.* had not been actually countermanded before the fact committed, *A.* had been acceſſary.

CHAP. LVI.

Of acceſſaries after the fact.

THIS kind of acceſſary after the fact is where a perſon knowing the felony to be committed by another receives, relieves, comforts, or aſſiſts the felon.

This, as hath been ſaid, holds place only in felonies, and in thoſe felonies, where by the law judgment of death regularly ought to enſue, and therefore there is no acceſſary in petit larciny, homicide *per infortunium*, or homicide *ſe defendendo.* 15 *E.* 3. *Coron.* 116.

I ſhall conſider, 1. What ſhall not be a receiving or relieving to make an acceſſary after, and 2. What ſhall be ſuch a receiving or relieving to make an acceſſary after.

If *A.* knows that *B.* hath committed a felony, but doth not diſcover it, this doth not make *A.* an acceſſary after, but it is miſpriſion of felony, for which *A.* may be indicted, and upon his conviction fined and impriſond.

If *A.* ſees *B.* commit a felony, but conſents not, nor yet takes care to apprehend him, or to levy hue and cry after him, or upon hue and cry levied doth not purſue him, this is a neglect puniſhable by fine and impriſonment, but it doth not make *A.* an acceſſary after, 8 *E.* 2. *Coron.* 395. 3 *E.* 3. *Coron.* 293. *Stamf. P. C. Lib.* I. *cap.* 45. *f.* 40. *b.* 14 *H.* 7. 31. *b.*

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31. *b.* and the contrary opinion of ſome old books in this caſe is therefore rejected.

If *B.* commit a felony, and come to the houſe of *A.* before he be arreſted, and *A.* ſuffer him to eſcape without arreſt knowing him to have committed a felony, this doth not make *A.* acceſſary, but if he take money of *B.* to ſuffer him to eſcape, this makes him acceſſary, 9 *H.* 4. 1. and ſo it is if *A.* ſhut the fore-door of his houſe, whereby the purſuers are deceived, and the felon hath opportunity to eſcape, this makes *A.* acceſſary, for here is not a bare omiſſion, but an act done by *A.* to accommodate his eſcape. 8 *E.* 2. *Coron.* 427.

A. hath his goods ſtolen by *B.* if *A.* receives his goods again ſimply without any contract to favour him in his proſecution, or to forbear proſecution, this is lawful; but if he receive them upon agreement not to proſecute or to proſecute faintly, this is theft-bote puniſhable by impriſonment and ranſom (*a*), but yet it makes not *A.* an acceſſary, 42 *Aſſiz.* 5. *b.* 3 *E.* 3. *Coron.* 353. *Stamf. P. C. f.* 40. *a.* but if he take money of *B.* to favour him, whereby he eſcapes, this makes him acceſſary. *Dalt.* 263. (*b*), *Crompt.* 41. *b.*

A. hath his goods ſtolen by *B.* who ſells them to *C.* upon a juſt value, tho *C.* know them to be ſtolen, this makes not *C.* acceſſary, unleſs he receive the felon. *Dalt. cap.* 108. *p.* 288. (*c*)

But by ſome opinions, if he buy them at an under value, it makes him acceſſary, *per Crompt.* 43. *b.* and Sir *Nich. Hyde Dalt. ubi ſupra*; but it ſeems this makes not an acceſſary, for if there be any odds, he that gives more, benefits the felon more than him that gives leſs than the value, but it may be a miſdemeanor puniſhable by fine and impriſonment, and the buying at an under value is a preſumptive evidence, that he knew they were ſtole, but makes him not acceſſary.

If *A.* hath his goods ſtolen by *B.* and *C.* knowing they were ſtolen receives them, this ſimply of itſelf makes not an acceſſary, and therefore it hath been often ruled (*d*), that to ſay *J. S. hath received ſtolen goods knowing them to be ſtolen,* is

(*a*) *Vide antea, p.* 526. & *notas ibid.*
(*b*) *New Edit. p.* 532.
(*c*) *New Edit. ibid.*
(*d*) *Dawſon's* caſe, *Vol.* 4.

is not actionable, becauſe it imports not felony, but only a treſpaſs or miſdemeanor puniſhable by fine and impriſonment (*e*), for the indictment of an acceſſary after is that he received and maintained *the thief*, not *the goods* (*f*).

But yet it ſeems to me, that if *B.* had come himſelf to *C.* and deliverd him the goods to keep for him, *C.* knowing that they were ſtolen, and that *B.* ſtole them, or if *C.* receive the goods to facilitate the eſcape of *B.* or if *C.* knowingly receive them upon agreement to furniſh *B.* with ſupplies out of them, and accordingly ſupplies him, this makes *C.* acceſſary (*g*), and with this ſeems to agree the preamble of the ſtatute of 2 & 3 *E.* 6. *cap.* 24. *Crompt.* 41. *b.* for it is relieving and comforting.

But the bare receiving of ſtolen goods knowing them to be ſtolen makes not an acceſſary, for he may receive them to keep for the true owner, or till they are recoverd or reſtored by law; and ſo it ſeems are the books to be intended of 27 *Aſſiz.* 69. 25 *E.* 3. 39. (*b*), 9 *H.* 4. 1. *a.*

If a felon be in priſon, he, that relieves him with neceſſary meat, drink, or clothes for the ſuſtentation of life, is not acceſſary.

So if he be bailed out till the next ſeſſions, *&c.* it is lawful to relieve and maintain him, for he is *quodammodo* in cuſtody,

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(*e*) By 3 & 4 *W.* & *M. cap.* 9. "Receivers of ſtolen goods knowing them "to be ſtolen are to be deemed acceſ-"ſaries after the fact, and ſuffer as ſuch;" but becauſe theſe receivers often concealed the principal felons, and thereby eſcaped being puniſhed as acceſſaries; therefore by 1 *Ann. cap.* 9. "Whoſoever "ſhall buy or receive ſtolen goods know-"ing them to be ſtolen may be proſe-"cuted for a miſdemeanor, and puniſh-"ed by fine and impriſonment, tho the "principal felon be not convicted;" and this ſhall exempt them from being puniſhed as acceſſaries, if the principal ſhall afterwards be convicted.

(*f*) But by 5 *Ann. cap.* 31. "If any "perſon ſhall receive or buy knowingly "any ſtolen goods, or knowingly har-"bour or conceal any felon, he ſhall be "taken as acceſſary to the felon, and "ſhall ſuffer as a felon;" this ſtatute does not take away the benefit of clergy, but by 4 *Geo.* I. *cap.* 11. ſuch perſon may be tranſported for fourteen years.

(*g*) But becauſe this was difficult to prove, the confederates of ſuch thieves frequently diſpoſing of ſuch goods to the owners for a reward, under the notion of helping them again to their ſtolen goods, it is provided by 4 *Geo.* I. *cap.* 11. "That "whoſoever ſhall take a reward un-"der the pretenſe of helping any one to "ſtolen goods, ſhall ſuffer as a felon, "as if he himſelf had ſtolen the ſaid "goods, unleſs he cauſe ſuch felon to "be apprehended and brought to trial, "and give evidence againſt him;" upon this clauſe the famous *Jonathan Wild* was convicted and executed. 10 *Geo.* I.

(*b*) In the laſt edition of the year-books, which is in this place miſpaged, it is 25 *E.* 3. 82. *b.*

dy, and is under a certainty of coming to his trial. *Crompt.* 42. *b. Dalt. p.* 286. (*i*)

And therefore it is not treaſon thus to relieve a traitor, while he is in cuſtody or under bail, and therefore the ſtatute of 27 *Eliz. cap.* 2. that makes it felony to relieve a jeſuit, hath yet this qualification *being at liberty and out of bold.*

But if a felon be in gaol, for a man to convey inſtruments to him to break priſon to make an eſcape, or to bribe the gaoler to let him eſcape makes the party an acceſſary, for tho common humanity allows every man to afford them neceſſary relief, yet common juſtice prohibits all men unlawful attempts to cauſe their eſcapes.

If *A.* ſpeak or write in favour of a priſoner for his favour and deliverance, this makes him not an acceſſary. 26 *Aſſiz.* 47.

To inſtruct a felon to read thereby to ſave him by his clergy makes not an acceſſary. *M.* 7 *R.* 2. (*k*), *Co. P. C. cap.* 64. *p.* 139.

If *A.* be committed for felony, and *B.* an attorney adviſe the friends of *A.* to write to the witneſſes not to appear againſt him, who writes accordingly, this makes neither *B.* nor the friends acceſſary, but is a miſdemeanor puniſhable by fine and impriſonment. *Co. P. C. ubi ſupra.*

A feme covert cannot be an acceſſary for the receipt of her huſband, for ſhe ought not to diſcover him.

But the huſband may be an acceſſary for the receipt of his wife. *Stamf. P. C. Lib.* I. *cap.* 19. *fol.* 26. *a.*

If the wife alone, her huſband being ignorant, do knowingly receive *B.* a felon, the wife is acceſſary and not the huſband. 15 E. 2. *Coron.* 383.

But if the huſband and wife both receive a felon knowingly, it ſhall be judged only the act of the huſband, and the wife acquitted. *M.* 37 E. 3. *Rot.* 34. *in dorſ. Rex. Coram Rege.* (*l*)

(*i*) *New Edit. p.* 550.

(*k*) *Rot.* 3°. *Rex. Cant.*

(*l*) This was the caſe of *Richard Dey* and *Margery* his wife, (*vide ſupra p.* 47.) who had been indicted before the ſheriff of *Lincoln pro receptamento felonum*; the indictment was ſent *coram rege: Richard* ſurrenderd himſelf and alleged, that he had been tried and acquitted on the ſaid indictment before the juſtices of gaol-delivery at *Lincoln*, and was admitted to bail; after which the judge of gaol-delivery

To make an acceſſary to felony there muſt be a felony committed by him, to whom he is acceſſary.

A. gives *B.* a mortal ſtroke, *C.* receives or relieves *A.* or helps him to eſcape, and then *B.* dies, *C.* ſhall not be an acceſſary to the felony, becauſe when he received him no felony was done.

But a man may be acceſſary to an acceſſary by the receiving of him knowing him to be an acceſſary to felony. *Stamf. P. C. cap.* 46. *f.* 43. *b.* 22 *Aſſiz.* 52.

There can be no acceſſary in receipt of a felon, unleſs he know him to have committed a felony: *vide Stamford's P. C.* 41. *b.*

But yet it hath been held, that if the party be attaint of felony by outlawry or otherwiſe in the county of *A.* if any one of that county receive him, he is acceſſary, whether he had notice or not, becauſe he is a felon by matter of record, whereof all in the ſame county ought to take notice. 12 *E.* 2. *Coron.* 377. *Stamf. P. C. cap.* 46. *fol.* 41. *b.*

But it ſeems to me neceſſary to make an acceſſary after, that there be notice, altho the felon were attaint in the ſame county, for preſumption ſhall not make men criminal, where the puniſhment is capital.

delivery ſent the record of *Richard's* acquittal; *Margery* the wife pleaded, that ſhe alſo had been tried and acquitted, and was alſo bailed, but afterwards ſhe not appearing a *Capias* was awarded againſt her and her bail: upon this her husband and one *John Hode* two of her bail come into court, *Et petunt ipſos admitti ad finem cum domino rege occaſione prædictâ faciendum, & admittuntur*; ſometime afterwards the ſaid *John Hode* came into court and alleged, that he had been unjuſtly fined, "Quia prædictum "indictamentum ſuper prædictam *Margeriam* factum minus ſufficiens eſt, eo "quod prædicta *Margeria* tempore, "quo ipſa dictos felones receptaſſe ſeu "eis conſentire debuiſſet, fuit cooperta "prædicto *Ricardo* viro ſuo, & adhuc eſt "& omnino ſub poteſtate ſua [ejus], cui "ipſa in nullo contradicere potuit, & ex "quo non inferitur in indictamento prædicto, quod ipſa aliquod malum fecit, "nec eis conſentivit, ſeu ipſos felones "receptavit ignorante viro ſuo, petit judicium, ſi ipſa vivente viro ſuo de aliquo receptamento in præſentia viri "ſui occaſionari poſſit." The court took time to conſider of this plea, and in *Michaelmas* term *anno* 40 gave the following judgment, "Viſo & diligenter "examinato indictamento prædicto ſuper præfatam *Margeriam* facto videtur curiæ, quod indictamentum illud "minus ſufficiens eſt ad ipſam inde ponere reſponſuram. Ideo ceſſet proceſſus verſus eam omnino. See *Co. P. C. p.* 108.

CHAP. LVII.

Concerning the order of proceeding *againſt acceſſaries.*

THE acceſſary may be indicted in the ſame indictment with the principal, and that is the beſt and moſt uſual way; but he may be indicted in another indictment, but then ſuch indictment muſt contain the certainty and kind of the principal felony.

If a man were acceſſary before or after in another county, than where the principal felony was committed, at common law it was diſpuniſhable, but now by the ſtatute of 2 & 3 *E.* 6. *cap.* 24. the acceſſary is indictable in that county, where he was acceſſary, and ſhall be tried there, as if the felony had been committed in the ſame county; and the juſtices, before whom the acceſſary is, ſhall write to the juſtices, *&c.* before whom the principal is attainted, for the record of the attainder.

This writing is to be by writ in the king's name under the *teſte* of the juſtice ſo ſending it. *Dy.* 253. *b.*

If the acceſſary be indicted either alone or together with the principal, proceſs of outlawry ſhall not go againſt the acceſſary till the principal be attainted or outlawed, neither ſhall he be put to plead till the principal appear, but ſhall be bailed till the principal appear: *vide Weſtm.* 1. *cap.* 14. (*a*)

The acceſſary ſhall not be conſtrained to anſwer to his indictment, till the principal be tried, 9 E. 4. 48. *a.* but if he will wave that benefit, and put himſelf upon his trial before the principal be tried he may, and his acquittal or conviction upon ſuch trial is good. *Stamf. P. C. Lib.* I. *cap.* 49. *f.* 46. *b.*

But it ſeems neceſſary in ſuch caſe to reſpite judgment till the principal be convicted and attaint, for if the principal be after acquitted, that conviction of the acceſſary is annulled,

(*a*) 2 *Co. Inſtit.* 183. This is now altered by 1 *Ann. cap.* 9.

nulled, and no judgment ought to be given againſt him; but if he be acquitted of the acceſſary, that acquittal is good, and he ſhall be diſcharged. 8 *H.* 5. 6. *b. Coron.* 463.

If *A. B.* and *C.* be indicted as principals, and *D.* is indicted as acceſſary to them all, *D.* ſhall not be arraigned till all the principals be attaint or outlawed, for if *A.* and *B.* be tried, and acquit or attaint, yet *D.* may be acceſſary to *C.* and not to *A.* nor *B.* but if *A. B.* and *C.* be indicted as principals, and *D.* indicted as acceſſary to *A.* only, there if *A.* be attaint, tho *B.* and *C.* be not, yet *D.* ſhall be arraigned. 40 *Aſſiz.* 25. *Coron.* 216. 7 *H.* 4. 36. *b. Stamf. ubi ſupra.*

But yet the court may if they pleaſe arraign the acceſſary in the firſt caſe (*b*), for if he be found acceſſary he ſhall have judgment, but if acquitted of being acceſſary to *A.* yet that acquittal diſchargeth him not of being acceſſary to *B.* or *C.* and therefore when they come in and plead and are attaint, *D.* may be arraigned *de novo* as acceſſary to *B.* and *C. Plowd. Com.* 98. *b. Gittin's* caſe. So that it is in the diſcretion of the court to arraign him or not before *B.* and *C.* be attaint, tho it be the ſafer courſe to reſpite the arraignment of the acceſſary till *B.* and *C.* appear or are outlawed.

If *A.* be indicted or appeald as principal, and *B.* as acceſſary before or after by the ſame indictment, and the principal plead in bar or abatement, or *autrefoits acquit*, the acceſſary ſhall not be forced to anſwer, till that plea be determined, for if it be found for *A.* the acceſſary is diſcharged, if againſt *A.* yet he ſhall after plead over to the felony, and may be acquitted. 9 *H.* 7. 19. *b.*

If *A.* be indicted as principal, and *B.* as acceſſary, they may be both arraigned together, and plead together, and put upon their trial by the ſame jury, and the jury ſhall be charged to inquire firſt of the principal, and if they find him not guilty, then to acquit the acceſſary; but if they find him guilty, then to inquire of the acceſſary. *Seigneur Sanchar's* caſe (*c*),

3 40 *Aſſiz.*

(*b*) To make this conſiſtent with what goes before, we muſt underſtand the *former* paſſage to mean, that where he is indicted as acceſſary to all, he ſhall not be arraigned *as acceſſary to them all* till all be attaint or outlawed, and *this*, that the court may in ſuch caſe, if they pleaſe, arraign him only *as acceſſary to him who is attaint*, tho the others do not appear.

(*c*) 9 *Co. Rep.* 119. *a.*

40 *Aſſiz.* 8. 7 *H.* 4. 36. *b. Coke ſuper* ſtatute *Weſtm.* 1. *cap.* 14. (*d*); but in that caſe judgment muſt be firſt given of the principal, for if any thing obſtruct judgment, as clergy, a pardon, *&c.* the acceſſary is to be diſcharged.

If *A.* be attaint of murder upon an appeal, and then *A.* is indicted of murder as principal, and *B.* as acceſſary, the principal pleads the former attainder, *B.* ſhall not be put to anſwer as acceſſary, becauſe he is not attaint upon the ſame ſuit, and ſo it is if the attainder of *A.* were firſt upon the appeal. 7 *H.* 4. 36. *a. Stamf. P. C.* 47. *a. Coke ubi ſupra.*

If the principal be attainted and hath his clergy, or be pardond after attainder, the acceſſary ſhall be put to anſwer; but if the principal be only convict and hath his clergy, or be pardond, or ſtand mute, or die in priſon before judgment, or challenge above thirty-ſix peremptorily, the acceſſary ſhall not be put to anſwer, for the principal was never attainted (*e*), and altho formerly there were diverſity of opinions in the books in theſe caſes (*f*), yet the law is now ſettled as above (*g*), 4 *Co. Rep.* 43, 44. *Bibith's* caſe and *Syer's* caſe, *Coke ſuper Weſtm.* 1. *cap.* 14.

If the principal be erroneouſly attaint, the acceſſary ſhall be put to anſwer, and ſhall not take advantage of the error in that attainder, 2 *R.* 3. 21, 22. but the principal reverſing the attainder reverſeth the attainder of the acceſſary. 18 *E.* 4. 9. *b.*

If *A.* be indicted as principal, and *B.* as acceſſary before or after, and both be acquit, yet *B.* may be indicted as principal, and the former acquittal as acceſſary is no bar. 4 *E.* 6. *B. Coron.* 186. *Knighuley's* caſe, *Crompt. f.* 43. *a.*

7 U But

(*d*) 2 *Co. Inſtit.* 184.

(*e*) It was for this reaſon, that *Weſton* the principal actor in the murder of Sir *Thomas Overbury* could not for a long while be prevailed with to plead, that ſo the earl and counteſs of *Somerſet*, who were the movers and procurers might eſcape. See *State Tr. Vol.* I. *p.* 314.

(*f*) See *Coron.* 51, 58.

(*g*) But ſince our author wrote, it is ſettled quite otherwiſe by 1 *Ann. cap.* 9. for by that ſtatute, " If any principal " offender ſhall be convicted of felony, " ſtand mute, or challenge above twenty, " it ſhall be lawful to proceed againſt " the acceſſary, either before or after " the fact, in the ſame manner as if " ſuch principal felon had been at- " tainted thereof, notwithſtanding ſuch " principal felon be admitted to his " clergy, or otherwiſe delivered before " attainder; and every ſuch acceſſary, " if convicted, ſtand mute, *&c.* ſhall " ſuffer the ſame puniſhment, as if ſuch " principal had been attainted.

But if *A.* be indicted as principal and acquitted, he ſhall not be indicted as acceſſary before, and if he be, he may plead his former acquittal in bar, for it is in ſubſtance the ſame offenſe, *Stamf. P. C. Lib.* II. *cap.* 36. *fol.* 105. *a.* 2 *E.* 3. *Coron.* 150 & 282. but the antient law was otherwiſe. 8 *E.* 2. *Coron.* 424.

But if he be indicted as principal and acquitted, he may yet be indicted as acceſſary after, for they are offenſes of ſeveral natures. 27 *Aſſiz.* 10. 8 *H.* 5. *Coron.* 463. *Stamf. P. C. ubi ſupra.*

And ſo it is, if he be indicted as acceſſary before and acquitted, yet for the ſame reaſon he may be indicted as acceſſary after.

CHAP. LVIII.

Concerning felonies by act of parliament, *and firſt concerning* rape.

HAving thus conſiderd the felonies, that are by the common law, I now proceed to the handling of felonies by act of parliament, and becauſe it is hardly poſſible to reduce the titles of them under any dependent method, and difficult to digeſt them under heads, I ſhall take them up in order of time according to the ſeries and order of the reigns and years of the ſeveral kings, wherein they were enacted, only where I meet with any felony in the time of any king's reign I ſhall as near as I can bring together thoſe Acts of Parliament both before and after, that concern that ſubject.

And firſt concerning rape.

Rape was antiently a felony, as appears by the laws of *Adelſtane* mentiond by *Bracton Lib.* III. (*a*), and was puniſhed by loſs of life.

But in proceſs of time that puniſhment ſeemed too hard, but the truth is a ſevere puniſhment ſucceeded in the place thereof, *viz.* caſtration and the loſs of eyes (*b*), as appears by *Bracton* (who wrote in the time of *Henry* III.) *Lib.* III. *cap.* 28. but then, tho the offender were convict at the king's ſuit, the woman that was raviſhed (if ſingle) might, if ſhe pleaſed, redeem him from the execution, if ſhe elected him for her huſband, and the offender conſented thereunto, as appears by *Bracton ubi ſupra.*

This kind of puniſhment it ſeems continued till 3 *E.* 1. and then by the ſtatute of *Weſtm.* 1. *cap.* 13. (*c*), it was enacted, " That none raviſh or take with force a damſel within " age with her conſent nor againſt her conſent, nor no " dame, damſel of age, nor any other woman againſt her " will; and if any do it, the party may ſue within forty " days, and common right ſhall be done; and if none ſue " within forty days, the king ſhall have the ſuit, and the " party convict ſhall ſuffer two years impriſonment, and be " ranſomed at the king's pleaſure.

This ſtatute gives a puniſhment by impriſonment and ranſom only, if attaint at the king's ſuit, and takes away caſtration and putting out of eyes; but it ſeems as to the ſuit of the party, if commenced within forty days, it alters not the puniſhment before, *Le roy lui ferra common droiture.*

But by the ſtatute of *Weſtm.* 2. *cap.* 34. (*d*) the offenſe of rape is made felony, " If a man raviſh a married woman, " dame, or damſel, where ſhe neither aſſented before nor " after, *Eyt judgment de vy & member*; if ſhe aſſent after, " yet the king ſhall have the ſuit.

This created rape a felony, and therefore it was not inquirable in a leet, for it was made felony *de novo* by this ſtatute 22 *E.* 4. 22. *a.* 6 *H.* 7. 4. *b.*

Rape

(*a*) *De corona, cap.* 28. *f.* 147. *a.*

(*b*) By the laws of *William* I. this offenſe was puniſhed with caſtration. *Vide Leges Gul.* I. *l.* 19. *Wilk. Leg. Anglo-Sax. p.* 222 & 290.

(*c*) 2 *Co. Inſtit.* 180.

(*d*) 2 *Co. Inſtit.* 433.

Rape is the carnal knowledge of any woman above the age of ten years againſt her will, and of a woman-child under the age of ten years with or againſt her will. *Co. P. C. cap.* 11. *p.* 60.

The eſſential words in an indictment of rape are *rapuit & carnaliter cognovit*, but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit* are not ſufficient in a legal ſenſe to expreſs rape. 1 *H.* 6. 1. *a.* 9 *E.* 4. 26. *a.*

To make a rape there muſt be an actual penetration or *res in re*, (as alſo in buggery) and therefore *emiſſio ſeminis* is indeed an evidence of penetration, but ſingly of itſelf it makes neither rape nor buggery, but it is only an attempt of rape or buggery, and is ſeverely puniſhed by fine and impriſonment. *Co. P. C. cap.* 10. *p.* 59.

But the leaſt penetration maketh it rape or buggery, yea altho there be not *emiſſio ſeminis*, *Co. P. C. ubi ſupra*; the old expreſſion was *abſtulit ei virginitatem*, and ſometimes *pucellagium ſuum. Bract. Lib.* III. (*e*)

And therefore I ſuppoſe the caſe in my lord *Coke*'s 12 *Rep.* 36. 5 *Jac.* that ſaith, there muſt be both, *viz. penetratio & emiſſio ſeminis* to make a rape or buggery, is miſtaken, and contradicts what he ſaith in his pleas of the crown; and beſides, it is poſſible a rape may be committed by ſome, *quibus virgæ erectio adſit, & emiſſio ſeminis ex quodam defectu deſit*, as phyſicians tell us.

If *A.* actually raviſh a woman, and *B.* and *C.* were preſent, aiding and abetting, they are all equally principal, and all ſubject to the ſame puniſhment both at common law and ſince the ſtatute of *Weſtm.* 2. *de quo infra.*

It appears by *Bracton ubi ſupra*, that in an appeal of rape it was a good exception, *quod ante diem & annum contentas in appello habuit eam ut concubinam & amicam, & inde ponit ſe ſuper patriam*, and the reaſon was, becauſe that unlawful cohabitation carried a preſumption in law, that it was not againſt her will.

But this is no exception at this day, it may be an evidence of an aſſent, but it is not neceſſary that it ſhould be

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(*e*) *De corona, cap.* 28. *f.* 147. *b.*

be ſo, for the woman may forſake that unlawful courſe of life.

But the huſband cannot be guilty of a rape committed by himſelf upon his lawful wife, for by their mutual matrimonial conſent and contract the wife hath given up herſelf in this kind unto her huſband, which ſhe cannot retract.

A. the huſband of *B.* intends to proſtitute her to a rape by *C.* againſt her will, and *C.* accordingly doth raviſh her, *A.* being preſent, and aſſiſting to this rape: in this caſe theſe points were reſolved, 1. That this was a rape in *C.* notwithſtanding the huſband aſſiſted in it, for tho in marriage ſhe hath given up her body to her huſband, ſhe is not to be by him proſtituted to another. 2. That the huſband being preſent, aiding and aſſiſting, is alſo guilty as a principal in rape, and therefore, altho the wife cannot have an appeal of rape againſt her huſband, yet he is indictable for it at the king's ſuit as a principal. 3. That in this caſe the wife may be a witneſs againſt her huſband, and accordingly ſhe was admitted, and *A.* and *C.* were both executed. 8 *Car.* 1. *Caſus comitis Caſtelhaven.* (*f*)

If *A.* by force take *B.* and by force and menace compel her to marry him, and then with force *A.* hath the carnal knowledge of *B.* againſt her will, tho this marriage be voidable, yet it is not ſo ſimply void as to enable her to maintain an appeal of rape againſt *A.* for ſhe may by her conſent affirm this voidable marriage, and therefore in the like caſe *Rot. Parl.* 15 *H.* 6. *n.* 15. there was a ſpecial act of parliament to enable the lady *Iſabel Butler* to bring an appeal of rape againſt *William Pull* in that caſe notwithſtanding that marriage; but that marriage had been diſſolvable by a declaratory ſentence in court chriſtian, becauſe obtaind by a plain force; and if ſuch a diſſolution of the marriage had been obtaind, then it ſeems to me, that, if the carnal knowledge of her were forcible and againſt her will as well as the marriage, that rape was puniſhable as well by appeal at the ſuit of the lady, as by indictment at the ſuit of the king, without the aid of an act of parliament, for it was really a rape, only the marriage *de facto*

(*f*) See *Hut.* 115. *Ruſh. Coll. Vol.* II. *p.* 93—101. *State Tr. Vol.* I. *p.* 366.

was an impediment of its puniſhment ſo long as *de facto* the marriage continued, but now that impediment being removed by the declaratory ſentence, and the marriage made void *ab initio*, it is all one as if it had never been, and tho relation be a legal fiction and *intenta ad unum*, yet in this caſe the marriage and carnal knowledge being one intire act of force and conſecutive one upon another, in the real effect of that firſt force, it ſhall remain puniſhable as if there had been no marriage at all; but the ſtatute of 3 *H.* 7. *cap.* 2. (*g*) hath provided a remedy in this caſe, ſo that this difficulty need not come in queſtion.

An infant under the age of fourteen years is preſumed by law unable to commit a rape, and therefore it ſeems cannot be guilty of it, and tho in other felonies *malitia ſupplet ætatem* in ſome caſes as hath been ſhewn, yet it ſeems as to this fact the law preſumes him impotent, as well as wanting diſcretion.

But he may be a principal in the ſecond degree, as aiding and aſſiſting, tho under fourteen years, if it appear by ſufficient circumſtances, that he had a miſchievous diſcretion, as well as in other felonies.

Thus far of the nature of rape, and who may be culpable of it. Now we will conſider upon whom it may be committed, and ſome other conſiderations touching this fact.

It was doubted, whether a rape could be committed upon a female child under ten years old, *Mich.* 13 & 14 *Eliz. Dy.* 304. *a.* By the ſtatute of 18 *Eliz. cap.* 7. it is declared and enacted, "That if any perſon ſhall unlawfully and carnally "know and abuſe any woman-child under the age of ten "years, it ſhall be felony without the benefit of clergy.

My lord *Coke* adds the words, *either with her will or againſt her will*, as if were ſhe above the age of ten years, and with her will, it ſhould not be rape; but the ſtatute gives no ſuch intimation, only declares that ſuch carnal knowledge is rape.

And

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(*g*) By this ſtatute a forceable taking away and marrying a woman againſt her will is made felony.

And therefore it ſeems, if ſhe be above the age of ten years and under the age of twelve years, tho ſhe conſent, it is rape, 1. Becauſe the age of conſent of a female is not ten but twelve. 2. By the ſtatute of *Weſtm.* 1. *cap.* 13. *Roy defend, que nul ne raviſe ne prigne a force damſel deins age, ne per ſon gree ne ſans ſon gree*; and my lord *Coke* in his expoſition upon that ſtatute (*b*) declares, that theſe words *deins age* muſt be taken for her age of conſent, *viz.* twelve years, for that is her age of conſent to marriage, and conſequently her conſent is not material in rape, if ſhe be under twelve years old, tho above ten years old, altho thoſe words are by ſome miſtake crept into my lord *Coke*'s definition of rape, *Co. P. C. cap.* 11. but if ſhe be above the age of twelve years, and conſenting at the time of the fact committed, it is not felony.

But if ſhe were above the age of twelve years, and conſented upon menace of death, if ſhe conſented not, this is not a conſent to excuſe a rape. 5 *E.* 4. 6. *a. Dalt. cap.* 107. (*i*)

And therefore that opinion of Mr. *Finch* cited by *Dalton ubi ſupra*, and by *Stamford*, *cap.* 14. *fol.* 24. out of *Britton*, that it can be no rape, if the woman conceive with child, ſeems to be no law, *mulier enim vi oppreſſa concipere poteſt.*

If the woman conſented not at the time of the rape committed, but conſented after, ſhe ſhall not have an appeal of rape by the ſtatute of *Weſtm.* 2. *cap.* 34. but yet the king ſhall have the ſuit by indictment, and by the ſtatute of 6 *R.* 2. *cap.* 6. if ſhe have a huſband, he ſhall have an appeal, and if ſhe have none, then her father or other next of blood ſhall have an appeal of ſuch rape; and by the ſame ſtatute as well the raviſher as the raviſhed, that ſo aſſented, are diſabled to have any dower, inheritance or jointure; and the next of blood of ſuch raviſher or aſſenting raviſhed, to whom their lands ſhould revert, remain, or fall after their death, ſhall enter upon the ſame, and hold it as an eſtate of inheritance.

But an aſſent after through menace of death is not ſuch an aſſent, as incurs this penalty; *quod vide* 5 *E.* 4. 6. *a.*

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(*b*) 2 *Inſt.* 182. (*i*) *New Edit. cap.* 160. *p.* 324.

As in other felonies, ſo in this there are or may be acceſſaries before and after, for tho this be a felony by act of parliament, that ſpeaks only of thoſe that commit the offenſe, yet conſequentially and incidentally acceſſaries before and after are included, and ſo in every new ſtatute making a felony without ſpeaking of acceſſaries before or after. *Co. P. C. cap.* 10. *p.* 59. and ſo in buggery.

And note, that at the time of the making of the ſtatute of 13 *E.* 1. rape was not felony, for it had long continued under the nature only of a miſdemeanor and not a felony, and therefore it is not at this day inquirable in a leet, becauſe it is a felony newly created. 6 *H.* 7. 4. *b.* 22 *E.* 4. 22. *a.*

The regular means of bringing this offenſe to judgment was either at the ſuit of the king by indictment, or at the ſuit of the party by appeal.

The indictment ought to have theſe ingredients, 1. It muſt be *felonicè.* 2. It muſt be *rapuit & carnaliter cognovit.* 3. It muſt conclude *contra formam ſtatuti* 13 & 14 *Eliz. Dy.* 304. *a.*

It may be proſecuted by indictment at any time, *for nullum tempus occurrit regi.*

An appeal of rape lies for the party raviſhed, and if ſhe conſent after the rape, ſhe is barred of her appeal, and her huſband, if married, or the next of kin, if ſingle, may have the appeal by the ſtatute of 6 *R.* 2. *cap.* 6.

If the next of kin were the raviſher, his next of kin ſhall have the appeal by the equity of the ſtatute of 6 *R.* 2. 28 *H.* 6. *Coron.* 459.

As to the appeal of the party raviſhed two things are neceſſary, 1. That ſhe make freſh diſcovery and purſuit of the offenſe and offender, otherwiſe it carries a preſumption that her ſuit is but malicious and feigned; this *Bracton* at large deſcribes *Lib.* III. *cap.* 28. *f.* 147. *a. Cum igitur virgo corrupta fuerit & oppreſſa, ſtatim cum factum recens fuerit cum clamore & hutesio debet accurrere ad villas vicinas, & ibi injuriam ſibi illatam probis hominibus oſtendere, ſanguinem & veſtes ſuas ſanguine tinctas & veſtium ſciſſuras, & ſic ire debet ad præpoſitum hundredi & ad ſervientem domini regis, & ad coronatores & vicecomitem,*

comitem, & ad primum comitatum faciat appellum, &c. 2. That the appeal be ſpeedily proſecuted, for it ſeems, that a year and a day is not allowd in this appeal, but ſome ſhort time, tho it be not defined in law what time, but lies much in the diſcretion of the court upon the circumſtances of the fact, yet the ſtatute of *Weſtm.* 1, *cap.* 13, allowd but forty days: long delay of proſecution in ſuch caſe of rape always carries a preſumption of a malicious proſecution. 3. If the wife hath once conſented after, her appeal is barred.

By the ſtatute of 18 *Eliz. cap.* 7. the principals in rape are ouſted of clergy, whether they be principals in the firſt degree, *viz.* he that committed the fact, or principals in the ſecond degree, *viz.* preſent, aiding, and aſſiſting; but acceſſaries before and after have their clergy.

Touching the evidence in an indictment of rape given to the grand jury or petit jury.

The party raviſhed may give evidence upon oath, and is in law a competent witneſs, but the credibility of her teſtimony, and how far forth ſhe is to be believed, muſt be left to the jury, and is more or leſs credible according to the circumſtances of fact, that concur in that teſtimony.

For inſtance, if the witneſs be of good fame, if ſhe preſently diſcoverd the offenſe and made purſuit after the offender, ſhewd circumſtances and ſigns of the injury, whereof many are of that nature, that only women are the moſt proper examiners and inſpectors, if the place, wherein the fact was done, was remote from people, inhabitants or paſſengers, if the offender fled for it; theſe and the like are concurring evidences to give greater probability to her teſtimony, when proved by others as well as herſelf.

But on the other ſide, if ſhe conceald the injury for any conſiderable time after ſhe had opportunity to complain, if the place, where the fact was ſuppoſed to be committed, were near to inhabitants or common recourſe or paſſage of paſſengers, and ſhe made no outcry when the fact was ſuppoſed to be done, when and where it is probable ſhe might be heard by others; theſe and the like circumſtances carry a ſtrong preſumption, that her teſtimony is falſe or feigned.

If the rape be committed upon a child under twelve years old, whether or how ſhe may be admitted to give evidence may be conſiderable. (*)

It ſeems to me, that if it appear to the court, that ſhe hath that ſenſe and underſtanding that ſhe knows and conſiders the obligation of an oath, tho ſhe be under twelve years, ſhe may be ſworn; thus we find it done in caſe of evidences againſt witches, an infant of nine years old was ſworn. *Dalt. cap.* 111. *p.* 297. (*k*)

But if it be an infant of ſuch tender years, that in point of diſcretion the court ſees it unfit to ſwear her, yet I think ſhe ought to be heard without oath to give the court information, tho ſingly of itſelf it ought not to move the jury to convict the offender, nor is it in itſelf a ſufficient teſtimony, becauſe not upon oath, without concurrence of other proofs, that may render the thing probable; and my reaſons are, 1. The nature of the offenſe, which is moſt times ſecret, and no other teſtimony can be had of the very doing of the fact, but the party upon whom it is committed, tho there may be other concurrent proofs of the fact when it is done. 2. Becauſe if the child complain preſently of the wrong done to her to the mother or other relations, their evidence upon oath ſhall be taken, yet it is but a narrative

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(*) For ſhe might at that age maintain an appeal *pro raptu*, *Paſch.* 33 *E.* 1. *Rot.* 16. *in dorſo. London. Coram Rege. James Pocbin* merchant was attached, and brought *Coram Rege* to anſwer to *Iſabel* daughter of *Emma de Langeleye de raptu, & pace regis fractâ*, who appeald him after this manner, *per quendam narratorem ſuum dicens*,----Iſabella *filia* Emmæ de Langeleye *de ætate novem annorum & dimidii dicit, quòd prædictus* Jacobus *die dominicâ proximâ poſt feſtum ſancti* Martini, *anno R. R. E.* 33. *apud* London *in altâ ſtratâ regis ex oppoſito eccleſiæ ſancti* Benedicti de Scherhog *horâ veſperinâ ipſam* Iſabellam *cepit, & in quâdam taberuâ ſuâ portavit, & contra pacem domini regis cum eâ concubuit, & virginitatem ſuam rapuit; & petit quòd juſtitiarii domini regis ſuper hoc ſibi faciant juſtitiam & remedium. Et queritur, quòd prædicta tranſgreſſio ſibi facta fuit die & anno prædictis ad dampnum ipſius* Iſabellæ *centum librarum, &c. Et prædictus* Jacobus *venit, & defendit omnem felloniam, raptum, &c. Et petit allocantiam de appello ipſius* Iſabellæ, *deficit ipſum* Jacobum *per verba in appello uſualia, & neceſſaria, ac convenientia, non appellat. Et quia conſtat curiæ, quòd appellum, &c. inſufficiens eſt, conſideratum eſt, quòd prædicta* Iſabella *committatur mareſcallo; & poſtea ei remittitur priſona, & prædictus* Jacobus *quoad appellum ipſius* Iſabellæ *eat inperpetuum quietus, &c.* He was then arraigned at the king's ſuit *de raptu prædicto*, and was tried, and convicted, but the king afterwards *remiſit prædicto* Jacobo *judicium vitæ & membrorum; & quòd faciat redemptionem pro delicto prædicto, & finem fecit cum domino rege per centum libras.*

(*k*) *New Edit. p.* 341.

of what the child told them without oath, and there is much more reaſon for the court to hear the relation of the child herſelf, than to receive it at ſecond-hand from thoſe, that ſwear they heard her ſay ſo; for ſuch a relation may be falſified, or otherwiſe repreſented at the ſecond-hand, than when it was firſt deliverd.

But in both theſe caſes, whether the infant be ſworn or not, it is neceſſary to render their evidence credible, that there ſhould be concurrent evidence to make out the fact, and not to ground a conviction ſingly upon ſuch an accuſation with or without oath of an infant.

For in many caſes there may be reaſon to admit ſuch witneſſes to be heard in caſes eſpecially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the witneſſes as well as the truth of the fact; it is one thing, whether a witneſs be admiſſible to be heard, another thing, whether they are to be believed when heard.

It is true rape is a moſt deteſtable crime, and therefore ought ſeverely and impartially to be puniſhed with death; but it muſt be remembred, that it is an accuſation eaſily to be made and hard to be proved, and harder to be defended by the party accuſed, tho never ſo innocent.

I ſhall never forget a trial before myſelf of a rape in the county of *Suſſex*.

There had been one of that county convicted and executed for a rape in that county before ſome other judges about three aſſizes before, and I ſuppoſe very juſtly: ſome malicious people ſeeing how eaſy it was to make out ſuch an accuſation, and how difficult it was for the party accuſed to clear himſelf, furniſhed the two aſſizes following with many indictments of rapes, wherein the parties accuſed with ſome difficulty eſcaped.

At the ſecond aſſizes following there was an antient wealthy man of about ſixty-three years old indicted for a rape, which was fully ſworn againſt him by a young girl of fourteen years old, and a concurrent teſtimony of her mother and father and ſome other relations. The antient man, when

when he came to his defenſe, alleged that it was true the fact was ſworn, and it was not poſſible for him to produce witneſſes to the negative; but yet, he ſaid, his very age carried a great preſumption, that he could not be guilty of that crime; but yet he had one circumſtance more, that he believed would ſatisfy the court and the jury, that he neither was nor could be guilty, and being demanded what that was, he ſaid, he had for above ſeven years laſt paſt been afflicted with a rupture ſo hideous and great, that it was impoſſible he could carnally know any woman, neither had he upon that account during all that time carnally known his own wife, and offerd to ſhew the ſame openly in court; which for the indecency of it I declined, but appointed the jury to withdraw into ſome room to inſpect this unuſual evidence; and they accordingly did ſo, and came back and gave an account of it to the court, that it was impoſſible he ſhould have to do with any woman in that kind, much leſs to commit a rape, for all his bowels ſeemd to be fallen down into thoſe parts, that they could ſcarce diſcern his privities, the rupture being full as big as the crown of a hat; whereupon he was acquitted.

Again, at *Northampton* aſſizes before one of my brother juſtices upon the *Niſi prius*, a man was indicted for the rape of two young girls not above fourteen years old, the younger ſomewhat leſs, and the rapes fully proved, tho peremptorily denied by the priſoner, he was therefore to the ſatisfaction of the judge and jury convicted; but before judgment it was moſt apparently diſcoverd, that it was but a malicious contrivance, and the party innocent; he was therefore reprieved before judgment.

I only mention theſe inſtances, that we may be the more cautious upon trials of offenſes of this nature, wherein the court and jury may with ſo much eaſe be impoſed upon without great care and vigilance; the heinouſneſs of the offenſe many times tranſporting the judge and jury with ſo much indignation, that they are over-haſtily carried to the conviction of the perſon accuſed thereof by the confident teſtimony, ſometimes of malicious and falſe witneſſes.

CHAP. LIX.

Concerning the felony de uxore abductâ ſive raptâ cum bonis viri *ſuper ſtatutum Weſtm.* 2. *cap.* 34.

THE words of the ſtatute are, *De mulieribus abductis cum bonis virorum ſuorum habeat rex ſectam de bonis ſic aſportatis.*

This part of the ſtatute hath affinity with what goes before in the ſame ſtatute concerning rape; and tho this learning hath been long antiquated, yet it is of uſe to be known.

If a wife goes away of her own conſent with another man, and takes with her the goods of the huſband, this ſeems to be felony neither in the man nor in the wife, tho *Dalt. cap.* 104. *p.* 266. (*a*) takes it to be a felony in the man, that takes her and the goods; but it is a treſpaſs, for which at common law the huſband may have an action of treſpaſs, *quare uxorem ſuam cepit & abduxit cum bonis viri.*

But if *A.* take the wife of *B.* againſt her will with the goods of her huſband, but doth not actually raviſh the wife, it is felony as to the goods, for which the party may be indicted; but as to the taking away of the wife it is but a treſpaſs, for which the huſband may have his action of treſpaſs at common law, *quare uxorem ſuam rapuit & eam cum bonis & catallis ad valent &c. abduxit & adhuc detinet*, and in that action ſhall recover damages for the taking of his wife and goods at common law.

But it ſhould ſeem, that he might have his action grounded upon the ſtatute of *Weſtm.* 2. which differs only in this from a treſpaſs at common law, 1. That the treſpaſs at common law is *pone per vadios, &c.* but this is *attachies*, 14 *H.* 6. 2. *b.* Again, 2. The writ at common law is general, but this upon the

(*a*) *New Edit. p.* 504.

the ſtatute concludes *contra formam ſtatuti, quod vide Fitz. N. B.* 89. 9 *H.* 6. 2. *a.*

But without queſtion, if the wife were actually raviſhed and the goods taken, this action lies for the huſband, and he ſhall recover damages for the rape as well as the goods, tho the wife were dead or divorced after the rape. 44 *Aſſiz.* 13. 47 *E.* 3. *Action ſur ſtatute* 37.

And it ſeems ſuch an action was antiently in the nature of an appeal of rape and robbery grounded upon the ſtatute of *Weſtm.* 2.

And by the antient law the defendant being convicted in a writ founded upon this ſtatute, as before, was to have judgment of death, which appears moſt evidently by the ordinance of parliament, *Rot. Parl.* 8 *E.* 2. *M.* 3. and afterwards ſent by *Mittimus* into the king's bench, *T.* 11 *E.* 2. *Rot.* 4. *London*, which recites, that in ſuch caſe the defendant was not bailable, *Eo quod idem implacitatus, ſi hujuſmodi tranſgreſſione convictus fuiſſet, ſuſpenſioni adjudicari deberet*, and therefore provides, that the defendant, if of good fame, ſhall be bailed.

And according to this are the books 13 *Aſſiz.* 5. 15 *E.* 3. *Utlagarie* 49. *Coron.* 122. 18 *E.* 3. 32. *a.* and a caſe of a vicar cited to be 13 *E.* 2. who had his clergy in this caſe, but it ſhould ſeem it was intended, 1. When a rape was actually committed, *vide* 44 *Aſſiz.* 13. and 2. When the action was grounded upon the ſtatute, and not barely at common law.

But the law hath been long diſuſed to give a capital judgment upon this writ, and in proceſs of time nothing, as it ſeems, was recoverd but damages, tho the writ were brought upon the ſtatute, for *rapiat* is now intended of a ſimple taking. 9 *Eliz. Dy.* 256. *b.* 2 *Co. Inſtit.* 435. *ſuper Weſtm.* 2. *cap.* 34. 43 *E.* 3. 23. *a.*

And it ſeems the law was accordingly taken, for the ſtatute of 6 *R.* 2. *cap.* 6. gives an appeal to the huſband for the rape of his wife in ſome caſes, which it needed not have done, if by the law, as it was then uſed, the huſband might upon ſuch a writ convict the party, and obtain judgment of death againſt him.

And beſides, it was very inconvenient, that in a civil action formed for damages, and that wants the material terms of law to expreſs a felony, (namely *carnaliter cognovit* and *felonice*) judgment of death ſhould be given, and ſo this courſe expired of itſelf.

CHAP. LX.

Of felony by purveyors taking victuals without warrant.

BY the ſtatute of *Articuli ſuper Cartas, cap.* 2. It is enacted, *Si nul face priſes ſans garrant, & les emport encountre volunt de celui, a qe les biens ſont, ſoit maintenant arreſt per le vill, ou le priſe ſerra fait, & ameſne al prochein gaol: Et ſi de ceo ſoit attaint, ſoit fait de lui, come de laron, ſi la quantite de biens le demand.*

If *A.* having no commiſſion take goods by pretenſe of a commiſſion as purveyor, and the party not knowing that he hath no commiſſion ſell and ſuffer him to take it, yet this is felony; but if the owner knew he had no commiſſion, and yet willingly ſell it to him as a purveyor, and he take and carry it away, this is not a carrying away againſt the conſent of the owner to make a felony within this ſtatute. 2 *Co. Inſtit. p.* 546. *ſuper Articulis, cap.* 2.

This point of felony is confirmed by the ſtatute of 18 *E.* 3. *cap.* 7. and 4 *E.* 3. *cap.* 4.

Afterwards by the ſtatute of 5 *E.* 3. *cap.* 2, and 25 *E.* 3. *cap.* 1. "If a purveyor ſhall take goods above the value of "twelve-pence without teſtimony and appraiſement of the "conſtable, or without tallies given, this is alſo felony.

Again

Again, by the ſtatute of 25 *E.* 3. *cap.* 15. "If a purveyor "take ſheep and their wool betwixt *Eaſter* and *Midſummer*, "it is felony, if he ſhore them at his own houſe.

Again, by the ſtatute of 36 *E.* 3. *cap.* 2. "If any pur- "veyor take goods or carriage, otherwiſe than is containd "in their commiſſion, it is felony.

But in all theſe felonies the offender is not ouſted of clergy, but he ſhall have it: *vide Co. P. C. cap.* 24.

But theſe acts of parliament and the puniſhment of purveyors is now out of date, becauſe by the ſtatute of 12 *Car.* 2. *cap.* 24. all purveyance is taken away.

Only by two ſubſequent acts, namely 13 *Car.* 2. *cap.* 8. and 14 *Car.* 2. *cap.* 20. there is a ſpecial purveyance of carriage ſettled for the king's houſhold, and for the navy and carriage of ordnance; but the ſtatute of *Articuli ſuper cartas*, and the other ſtatutes making felony in caſe of undue purveyance do not concern this new eſtabliſhed purveyance, becauſe ſettled in another way; and therefore I ſhall ſay no more touching this matter.

CHAP. LXI.

Concerning the new felonies *enacted in the times of* E. 2. E. 3. *and* R. 2.

IN the times of thoſe kings there were but few new felonies enacted other than thoſe touching purveyors, whereof in the former chapter.

By the ſtatute of 1 *E.* 2. *De frangentibus priſonam* the law was ſettled in that point, whereof I have ſaid ſufficient *ſupra cap.* 54.

By the ſtatute of 14 *E.* 3. *cap.* 10. "If a gaoler or under- "keeper by too great dureſs of impriſonment, and by pain "make

" make any priſoner in his ward to become an appellor " againſt his will, and thereof be attaint, he ſhall have " judgment of life and member.

Theſe words in any act of parliament *Eit judgment de vy & member* create a felony.

This act extends to a gaoler *de facto*, tho he be not a gaoler *de jure*.

The offender hath the benefit of clergy: *vide Co. P. C. cap.* 29. *p.* 91. touching this felony.

By an act *Rot. Par.* 17 *E.* 3. *n.* 15. but not printed, the importation of falſe and evil money is prohibited under pain of life and member, and the exportation of coin or bullion prohibited under pain of forfeiture, and if the ſearcher be of confederacy with the exporter, it is enacted to be felony in the ſearcher.

If it be ſaid this act was needleſs to make importation of falſe money felony, becauſe declared treaſon by the ſtatute of 25 *E.* 3. the anſwer is obvious. By the act of 17 *E.* 3. beforementiond licence was granted to *Dutch* merchants and others to import their own coin ſo it were as good as ſterling, and that, if they pleaſed, the merchants might trade between themſelves with that forein money; and it was neceſſary in reſpect of that forein money to impoſe a new penalty upon the importers of falſe money of that kind, becauſe that forein coin was not within the ſtatute of 25 *E.* 3.

But this ſeems to be but a temporary law during that ſpecial intercourſe between the *Engliſh* and *Dutch*, and beſides by ſubſequent ſtatutes the penalty of treaſon is annexed to the importation of counterfeit coin made current by proclamation: *quod vide ſupra cap.* 20. *p.* 225.

By the ſtatute of 27 *E.* 3. *cap.* 3. of the ſtaple, the exportation of wools, woolfells, leather or lead by any *Engliſh*, *Iriſh* or *Welſhman*, is prohibited under pain of loſs of life and member, and forfeiture of lands and goods (*a*), but this was repeald by the ſtatute of 36 *E.* 3. *cap.* 11. whereby it was enacted, that merchants denizens may paſs with their wool as well as foreiners without being reſtrained.

(*a*) *Co. P. C. p.* 93.

But yet this was not full enough, and therefore by the ſtatute of 38 *E.* 3. *cap.* 6. there was a fuller repeal of the ſtatute of 27 *E.* 3. as to the point of felony, yet the forfeiture of lands and goods continued upon merchants denizens, and the ſtatute of the ſtaple was confirmed in all points by 38 *E.* 3. *cap.* 7.

But by the ſtatute of 43 *E.* 3. *cap.* 1. the ſtaple of *Calais* was aboliſhed, yet by 14 *R.* 2. *cap.* 5. exportation of wool, woolfells, leather and lead are prohibited to denizens under pain of forfeiture of them.

By the ſtatute of 27 *E.* 3. *de proviſoribus, cap.* 5. ingroſſing of *Gaſcoign* wines made felony, but that penalty repeald by the ſtatute 37 *E.* 3. *cap.* 16.

So that theſe ſtatutes ſtand now repeald.

But yet by the ſtatute of 18 *H.* 6. *cap.* 15. the carrying of wool or woolfells out of the realm to other places than to the ſtaple of *Calais* without the king's licence is felony, except wools carried to the ſtreights of *Morocco.*

This ſtatute is ſuppoſed by my lord *Coke, P. C. cap.* 32. to be in force, but that being doubted, becauſe the ſtaple of *Calais* then in uſe hath been long ſince aboliſhed, a new proviſion and a better is made by acts of this preſent parliament. (*b*)

But whether that act be in force or not, the offender was not thereby excluded of the benefit of clergy.

By the ſtatute of 34 *E.* 3. *cap.* 22. the concealing and taking away of an hawk was two years impriſonment; but by the ſtatute of 37 *E.* 3. *cap.* 19. the ſtealing of a faulcon, tercelet, lanner, or laneret is made felony.

See the commentary *Co. P. C. cap.* 34. where it is declared, that this act extends only to faulcons, and thoſe of that kind.

The proof intended by this act is not by jury but by circumſtances, as varvels, *&c.*

The offender is within benefit of clergy.

As to the laws in the time of *Richard* II.

6 *R.* 2. *cap.* 6. concerning the puniſhment of rape, *de quo ſatis cap.* 58.

7 *R.* 2. *cap.* 8. of purveyors, *de quo ſupra cap.* 60.

(*b*) 12 *Car.* 2. *cap.* 32. 13 & 14 *Car.* 2. *cap.* 18.

By the ſtatute of 13 *R.* 2. *cap.* 3. "If any man bring or "ſend into this realm or the king's power any ſummons, "ſentence or excommunication againſt any perſon for the "cauſe of making motion, aſſent or execution of the ſtatute "of proviſors, he ſhall be taken, arreſted, and put in priſon, "and forfeit all his lands, tenements, goods and chattels for "ever, and incur the pain of life and member; and if any "prelate make execution of ſuch ſummons, ſentence or ex-"communication, his temporalities ſhall be taken and abide "in the king's hands till due redreſs made.

"And if any perſon of leſs eſtate than a prelate make "ſuch execution, he ſhall be taken and arreſted and impri-"ſond, and make fine and ranſom by the diſcretion of the "king's council.

The bringing in of bulls of this nature is againſt the common law, and ſometimes antiently puniſhed as high treaſon. *Vide Co. P. C. cap.* 36. *& libros ibi.*

But now by the ſtatute of 13 *Eliz. cap.* 2. the offenſe as well in the bringers in, as executers of theſe bulls, *&c.* is made high treaſon, as well in perſons eccleſiaſtical as temporal.

There is nothing elſe in theſe kings reigns, that enacts a new felony, only ſome ſtatutes directing the proceſs and juriſdiction, whereby felonies may be tried, as 13 *R.* 2. *cap.* 2. of the conſtable and marſhal, *&c.*

CHAP.

CHAP. LXII.

Concerning the new felonies *enacted in the times of* H. 4. H. 5. H. 6. E. 4.

BY the ſtatute of 5 *H.* 4. *cap.* 4. it is ordaind, "That none "from thenceforth ſhall uſe to multiply gold or ſilver, "nor uſe the craft of multiplication, and if any do, he ſhall "incur the pain of felony in this caſe. (*a*)

And the reaſon of this act was not becauſe they thought the real tranſmutation of metals into gold or ſilver was feaſible, but the reaſon is given in the petition of the commons, *Rot. Par.* 5 *H.* 4. *n.* 63.

Car pluſers homes par colour de ceſt multiplication font faux monay a grand deceit du roy & damage de ſon people: vide tamen Co. P. C. cap. 20. diſpenſations granted to particular perſons by 34 & 35 *H.* 6. for the uſing of this art with a *non obſtante* of the ſtatute of 5 *H.* 4.

The offender is to have his clergy.

And altho the ſtatute mentions not acceſſaries before or after, yet this ſtatute making the fact felony doth conſequentially ſubject acceſſaries before and after to the penalty, tho this be made a *quære*. *Dy.* 88. in *Eden*'s caſe; yet it ſeems now ſettled according to the opinion of my lord *Coke*, *P. C. cap.* 20. that there may be acceſſaries to this new felony before and after.

By

(*a*) The offenſe prohibited by this act was not the extracting gold or ſilver out of lead or other metals, which is now known by the name of refining, for that is not the multiplication of gold or ſilver, but only a ſeparation thereof from the coarſer metal, but the deſign of the act was to prohibit the tranſmutation of one metal into another, which was pretended to be done by the philoſopher's ſtone or elixir, whereby great numbers were bubbled and cheated; but however, becauſe ſome perſons were (groundleſly) afraid to exerciſe the art of ſmelting and refining metals, leſt they ſhould fall under the penalty of this ſtatute, it was therefore repeald by 1 *W. & M. cap.* 30. provided that the gold or ſilver extracted by the ſaid art be carried to the *Tower* of *London* for the making of monies, and be not otherwiſe diſpoſed of.

By the ſtatute of 5 *H.* 4. *cap.* 5. cutting the tongues or putting out the eyes of the king's ſubjects of malice prepenſed is enacted to be felony.

This was extended to other diſmembring, as cutting off ears, by 37 *H.* 8. *cap.* 6. but by an act of this preſent parliament (*b*) this and ſome other diſmembrings are made felonies out of the benefit of the clergy.

By the ſtatute of 3 *H.* 5. *cap.* 1. "If any perſon do make, "buy, coin, or bring into the kingdom *Galli-half-pence*, *Suſ-* "*kins* or *Dodkins* to ſell or put them in payment in this "realm, it is felony.

And by the ſtatute of 2 *H.* 6. *cap.* 9. If any man pay or receive the money called *Blanks*, it is alſo felony; but both theſe are within clergy, and by the whole diſuſer of theſe coins theſe ſtatutes are of little uſe.

By the ſtatute of 2 *H.* 5. *cap.* 3. it is enacted, "That pro- "clamation ſhall iſſue, that all *Britons* depart out of the "realm before the feaſt of St. *John Baptiſt* next upon pain "of loſs of life and member.

But this was but a temporary law, and expired.

By the ſtatute of 3 *H.* 6. *cap.* 1. it is enacted, "That no "congregations or confederacies be made by maſons in their "aſſemblies, whereby the good order of the ſtatute of *La-* "*bourers* is violated; and they that cauſe ſuch aſſemblies to "be holden ſhall be adjudged felons.

But the ſtatute of *Labourers* being repeald by the ſtatute of 5 *Eliz.* *cap.* 4. this law is conſequentially repeald. *Co. P. C.* *cap.* 35. *p.* 99.

By the ſtatute of 8 *H.* 6. *cap.* 12. It is enacted, "That "if any record or parcel of the ſame, writ, return, panel, "proceſs, or warrant of attorney in the king's courts of chan- "cery, exchequer, the one bench or the other, or in the trea- "ſury be willingly ſtolen, taken away, withdrawn, or avoided "by any clerk, or by any other perſon, by cauſe whereof

(*b*) 22 & 23 *Car.* 2. whereby the cutting out or diſabling the tongue, putting out an eye, ſlitting the noſe, cutting off a noſe or lip, cutting off or diſabling any limb or member, if done with an intention to maim or diſfigure, is felony without benefit of clergy; upon this ſtatute *Coke* and *Woodburne* were convicted and executed for ſlitting the noſe of Mr. *Criſpe*, 8. *Geo.* I. See *State Tr. Fol.* VI. *p.* 212.

" the judgment ſhall be reverſed; that ſuch ſtealer, taker
" away, with-drawer, or avoider, their procuratores, coun-
" ſellors and abetters thereof indicted, and by proceſs there-
" upon made duly convict by their own confeſſion, or in-
" queſt thereupon taken of lawful men, half whereof ſhall
" be of men of any court of the ſame courts, and the other
" half of others, ſhall be judged for felons; and that the
" judges of the ſame courts, or of the one bench or the
" other, have power to hear and determine ſuch defaults
" before them, and thereof to make due puniſhment, as is
" aforeſaid.

In the conſideration of this ſtatute it will be convenient to examine, 1. How the law ſtood in reference to the matters aboveſaid before this act made. 2. What is the import of the ſeveral parts of this act.

At the common law the undue raſure or embezzeling of a record was a great offenſe, for which even a judge himſelf was puniſhable by fine and impriſonment. 2 *R.* 3. 10. *Hengham* a judge was fined eight hundred marks for raſing the record of a fine of thirteen ſhillings and four pence impoſed upon a poor man, and reducing it to ſix ſhillings and eight pence. (*c*)

By the ſtatute of *Weſtm.* 1. *viz.* 3 *E.* 1. *cap.* 29. It is enacted, " That if any ſerjeant, pleader, or other do any
" manner of deceit or colluſion to the king's court, or con-
" ſent to it in the deceit of the court, or to beguile the
" court or the party, and be thereof attaint, he ſhall be im-
" priſond for a year and a day, and from thenceforth ſhall
" not be heard to plead in that court.

And if he be no pleader, he ſhall be impriſond in like manner, and if the treſpaſs require greater puniſhment, it ſhall be at the king's pleaſure. (*d*)

2 Upon

(*c*) *Hengham* was a judge in the reign of *Edward* I. and his fine was employed for building a clock-houſe at *Weſtminſter*, and furniſhing it with a clock, which made *Southcot* (one of the judges of the king's bench in the reign of queen *Elizabeth*) when preſt by the chief juſtice to conſent to a raſure of the roll, ſay, that he would not do it, *for he meant not to build a clock-houſe.* Co. P. C. 3. 72.

(*d*) 2 *Co. Inſtit.* 213.

Upon this act it was that *Robert de Gresshope* a common attorney was imprisond for a year and a day, and banished the court of common pleas for embezzeling a part of a record, *viz. T.* 19 *E.* 1. *Rot.* 57. *in dorso*, C. B. mentiond in *Co. R. C. cap.* 19. *p.* 71. *vide simile H.* 22 *E.* 1. *Rot.* 33. *in dorso. Cant. Coram Rege.* (*)

T. 5 *E.* 3. *Rot.* 13. *in dorso. Rex. B. R. Thomas* of *Carleton* convict of the rasure of the word *et* in a writ is committed to the marshal, *& inhibitum est ei, ne amodo deserviat in officio sive servitio vicecom', periculo quod incumbit*; and this it seems was upon the same act of 3 *E.* 1. (*e*)

If a clerk had made a misentry of record, the judge, before whom it was, might *ore tenus* rectify that misentry, tho a considerable time after.

M. 24 *E.* 3. *Rot.* 41. *Kanc. Rex.* It was presented before *Richard de Kellesbull* and his fellow justices of *oyer* and *terminer* 18 *E.* 3. that one *Waresius atte Capele* had trespassed in the free warren of the earl of *Huntingdon*, and the abbot of *Bastel*, and he was convicted by his own confession, and the clerk had entred the fine ten shillings. The record being sent into the king's bench, *Richard de Kellesbull* came into the court, *& inspecto irrotulamento* said, *Quòd clericus suus finem illum surreptivè & contra recordum suum intravit, & dicit quòd finis ille assessus fuit per ipsum & socios suos pro quolibet articulo ad decem libras, & sic finis ejusdem* Warelii *summatus fuit ad viginti libras, & illud expresse ore tenus hic recordatur*, and prayed for the king, *quòd finis ille secundum recordum suum intretur in rotulis extractorum*, and it was accordingly entred; so that a judge of record is as it were a living record, and controls the entry of the clerk.

In the time of *Richard* II. there happend two great complaints against the judges and clerks for the misentry of a record:

(*) This was the case of *Giles de Derton*, who was convict, *eo quòd scienter procuravit omissionem dici in processu & recordo coram justiciariis de banco, quod coram rege venire fecit*; on account of which omission the judgment of the court of common pleas had been reversed, *pro deceptione predicta committitur marescallo, & postea finem fecit cum domino rege prò* 10 *solidis.*

(*e*) It does not appear from the record, whether the judgment was grounded on statute 3 *E.* 1. or on the common law.

cord: the one *Rot. Par.* 7 *R.* 2. *pars* 1. *n.* 57. for the lady *Spencer*, who pleaded to a *Quare Impedit* brought againſt her by the king; but at the end of *Trinity* term laſt the record of her plea was raſed in a material place to her great diſadvantage, and the judges refuſed to amend it, becauſe after the term: the anſwer was,

Tiel plee come les juſtices voillent recorder qe ent eſtoit pledez, ſoit de novel entre en le lieu de la raſure, nient contreſteant qe le terme, en qel le dit plee fuit pled, ſoit ja paſs, & roy voit qe celui, qe fiſt le raſure, ſoit puniſh pur ſon malfait.

The other was *Rot. Parl.* 7 *R.* 2. *pars* 2. *n.* 20. at the complaint of the prior of *Mountague*, That whereas in a writ of right brought againſt him he prayed in aid of the king, and was ouſted of aid by the court, who entred, *queſitum eſt a Priore, ſi quid, &c.* the judgment that was given was *dictum eſt Priori, quòd reſpondeat ſine auxilio*; and accordingly the judges came into parliament and agreed, that new entries ſhould be made, as was deſired by the prior, and thereupon the prior brought a writ of error in parliament upon the record ſo amended.

Theſe occurrences did the next parliament following, *viz.* 8 *R.* 2. draw on the act of 8 *R.* 2. *cap.* 4. againſt the raſing of records, and the falſe entring of pleas, whereby it is enacted, "That if any judge or clerk be of default (ſo that by "the ſame default enſueth diſheriſon of any of the par-"ties) ſufficiently convict before the king and his council, in "that way that the king and his council ſhall deem reaſon-"able, within two years after the default made, *&c.* he ſhall "be puniſhed by fine and ranſom at the king's will, and ſa-"tisfy the party.

Thus this act ſettled it, and ſo it ſtood till 8 *H.* 6. but in this act there occurred ſome inconveniences, 1. The way of trial before the king and council was difficult and inconvevient. 2. The puniſhment as to the clerks ſeemed too gentle. 3. It did not meet with the inconveniences of ſtealing records. 4. It was found of great inconvenience to the due adminiſtration of juſtice, for the judges have often occaſion upon their own memory of the record, and ſometimes upon

examination to rectify undue entries, and were required in ſome caſes to amend the miſentries or ſmall miſtakes in records by the ſtatute of 14 *E.* 3. *cap.* 16. and other ſtatutes, which could not be done without raſures and alterations of the record and roll.

To remedy the latter of theſe inconveniences in the beginning of this very ſtatute of 8 *H.* 6. *cap.* 12. and farther by the ſtatute of 8 *H.* 6. *cap.* 15. a liberal power is given to the juſtices to amend records, in the purſuance of which power they were by theſe acts of 8 *H.* 6. protected againſt the dangers and ſeverity of the act of *R.* 2.

And then this act proceeds to inflict puniſhment of felony againſt clerks and others, that willingly avoid records, *&c.* which penal law did not at all extend to judges upon three apparent reaſons, 1. Becauſe by this very law judges had power upon examination to amend records. 2. Becauſe the judges of the ſeveral courts are made the judges to hear and determine theſe offenſes. And 3. This clauſe not mentioning judges, (as that of 8 *R.* 2. did), but beginning with clerks and other perſons, judges ſhall not be included, who are ſuperior officers, upon the reaſon given in the 2 *Co. Rep. caſus archiepiſcopi Cant'*, and accordingly it is agreed by my lord *Coke*, *P. C. cap.* 19. *p.* 72.

Now I come to the conſideration of the ſtatute itſelf, wherein my lord *Coke*, *P. C. cap.* 19. hath made a full collection, to which I can add little.

1. It extends only to the four great courts of *Weſtminſter*, and not to inferior courts.

But as to the *Engliſh* part of the court of chancery it extends not, becauſe as to the *Engliſh* proceeding it is no court of record.

But yet it ſeems it doth extend to thoſe proceſſes, that iſſue out of that court under the great ſeal, tho they be proceſſes in order to the *Engliſh* proceeding, as *ſubpœna*'s, attachments, commiſſions to examine witneſſes, becauſe theſe being under the great ſeal are matters of record.

2. The *Treaſury* is added, which doth not only extend to the records of the treaſury of the courts of king's bench and

common pleas, but alſo to the records in the receipts of the exchequer, under the cuſtody of the treaſurer and chamberlains of the exchequer: And alſo to the records in the *Tower*, and in the chapel of the rolls, yea and the records in the cuſtody of the clerk of the lords houſe in parliament, (but not to the journals,) for thoſe are the king's treaſuries of records of the higheſt moment.

3. The offenſes mentiond are four, *ſtealing*, *carrying away*, *withdrawing*, or *avoiding*; and this laſt word *avoiding* is comprehenſive, for it extends to raſing, cutting off, clipping, yea and cancelling a record.

4. But theſe muſt be done *voluntarily*, as well as *felonice*, and both theſe words muſt be containd in the indictment upon this ſtatute.

A raſing or cancelling of a record by the order of that court, in whoſe cuſtody the record is, is no felony in him that doth it, nor in the court that commands it, for the court hath a ſuperintendence, as well over the record as over the clerks.

5. It extends not to judges for the reaſons before given.

6. It muſt be ſuch an embezzelling or avoiding of the record, by reaſon whereof a judgment is reverſed, and therefore it extends only to judicial records in any of thoſe four courts or treaſuries, be the judgment in a caſe criminal or civil.

And therefore it is equally an offenſe againſt this ſtatute whether the avoiding, *&c.* be after judgment given or before, in caſe judgment be given after the offenſe; and it is held, that an outlawry, tho it be *per judicium coronatorum*, is a judgment within this ſtatute.

If the judgment be not actually reverſed by ſuch embezzelling, *&c.* yet if it be reverſible by reaſon thereof, it is within this ſtatute 2 *R.* 3. 10.

And it extends not only to a reverſibleneſs by writ of error, but a reverſibleneſs or avoidableneſs of judgment by plea by reaſon of ſuch embezzelling, *&c.* is within this ſtatute 2 *R.* 3. 10.

But what if the offenſe of embezzelling, avoiding or raſing be ſuch as goes in affirmance of the judgment, and makes

it good, which otherwiſe were reverſible, if it ſtood as before that offenſe committed? tho this in ſome caſes be puniſhable by the court as a miſdemeanor in the clerk, yet it ſeems not felony within this act.

And the common practice at this day is, if the *Venire facias* or *Diſtringas* be erroneous, and would make the judgment erroneous if filed, but being not filed is aided by the ſtatute of 18 *Eliz. cap.* 14. the court never compels the clerk to file ſuch writs after verdict, much leſs puniſhes them for not doing it.

But if *A. B.* be ſued by the original to the *exigent* and outlawed, and afterward the *exigent* is made *C. B.* and the original is alſo made *C. B.* to make all agree, this is felony as well in the clerk that raſeth the original, as him that raſeth the exigent. 2 *R.* 3. 10.

7. If the offenſe riſeth in two counties, then it is diſpuniſhable. 2 *R.* 3. 10.

8. The trial is to be one half by the clerks of the court, and the other half by others.

9. The judges of the court of the one bench and the other are by this ſtatute enabled to hear and determine it without any other commiſſion, and each of theſe courts have a concurrent juriſdiction, and where it firſt begins, there it is to proceed.

So that it ſeemeth, if the offenſe were in the record of the king's bench, the juſtices of the common bench may hear and determine the offenſe, if it be there firſt indicted.

This power is to hear and determine, the conſequence whereof is, that it enables theſe reſpective courts to take indictments of theſe offenſes, this, tho it be intrinſical to the court of king's bench, (for they ſwear a grand inqueſt and take indictments every term,) yet it is a new power in the common bench.

And altho the trial of the offenſe is to be by a party-jury of clerks and others, yet the indictment may be taken either of clerks alone, or of foreiners alone, or of both, for it is only the trial, that is to be by a party-jury.

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In the caſe of *Danby* and others 2 *R.* 3. 10. theſe points were reſolved upon this ſtatute, 1. If the offenſe be entirely committed in the county, where the court of king's bench or common pleas ſit, it may be tried, heard and determined by either court without a ſpecial commiſſion, for the act of parliament is a commiſſion. 2. If it be committed entirely in a forein county, or be committed in the county where the court ſits, and then the court remove into another county, it muſt be heard and determined in the county where the fact was committed, and cannot be indicted, heard or determined in another county than where it was done. 3. That therefore in that caſe there muſt be a ſpecial commiſſion to the juſtices of the one court or to the juſtices of the other to hear and determine the offenſe in that other county, and then they may there take the indictment and try the offender by a party-jury according to the act; but it ſeems, if the indictment be taken by virtue of ſuch commiſſion, it may be removed into the king's bench by *Certiorari*, if indicted before them, and then tried according to the direction of the act. 4. If the offenſe were committed in *London*, where by privilege and charter of the city the mayor is to be one in commiſſion and of the *quorum*; yet in this caſe the mayor muſt not be named in the commiſſion, but only the juſtices of one of the courts. 5. If the offenſe be mixt, and partly in *Middleſex* where the court ſits, and partly in *London* or any other forein county, the felony is diſpuniſhable, and ſo it remains at this day, notwithſtanding the ſtatute of 2 & 3 *E.* 6. *cap.* 24. 6. But yet in this caſe the offender committing part of the offenſe in *Middleſex* may be indicted of miſpriſion of felony in *Middleſex*, or committing part of the offenſe in *London* may be indicted of miſpriſion of felony in *London*, and thereupon fined and impriſond: And accordingly it was done by the advice of all the judges, and the parties fined, for every felony includes miſpriſion.

And yet obſerve, 1. The felony was one intire felony committed in two counties, and therefore neither inquirable nor determinable in one county; for the jury of that county cannot

not take notice of part of the fact committed in another, and yet the miſpriſion of that felony was inquirable and puniſhable in either county, where but part of the felony was committed, and yet the jury in that caſe muſt take notice of the entire felony, part whereof was committed in another county. 2. Altho the felony itſelf is by the act limited to ſpecial juriſdiction and manner of trial, yet the miſpriſion of that felony was tried by a common jury and before the general commiſſioners of *oyer* and *terminer* in the county, where the offenſe was committed. In this offenſe the offender hath the benefit of clergy.

11 *H.* 6. *cap.* 14. It was made felony for three years to ſhip merchandizes of the ſtaple in any creeks, but this is expired.

18 *H.* 6. *cap.* 15. Exportation of wools, other than to the ſtaple of *Calais* or ſtreights of *Morocco*, felony. *Vid. ſupra cap.* 61. *p.* 642. *& infra.*

18 *H.* 6. *cap.* 19. Soldiers departing from their captain without licenſe, felony: this, together with thoſe other ſtatutes of the ſame kind, as 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. I ſhall refer to the ſtatute of 2 *E.* 6. *cap.* 2. where I ſhall take the whole matter of ſoldiers departing into conſideration.

28 *H.* 6. *cap.* 4. It is felony to take a diſtreſs in the counties and royal ſeignories in *Wales* or duchy of *Lancaſter*, and carry them out of the ſaid counties, duchy or ſeignories, *&c.* ſaving for the lords of fees diſtraining. This act was to continue only five years, and then expired.

33 *H.* 6. *cap.* 1. If houſhold ſervants after the death of their maſter violently and riotouſly take and ſpoil the goods of their maſter, and the ſame diſtribute among themſelves, upon complaint made by the executors, or two of them, to the chancellor, the chancellor with the advice of the chief juſtices and the chief baron, or two of them, ſhall direct writs of proclamation to the ſheriff for the offenders to appear in the king's bench upon ſome day certain, fifteen days at leaſt after the proclamation.

And if he appear, he ſhall be committed to anſwer the ſuit of the executors by bill or writ; but if he appear not at the return of the writ after proclamation ſo made, he ſhall be attaint of felony.

This ſtatute extends to one executor, if but one, and to adminiſtrators, if no executors, to a lord keeper of the great ſeal, when no chancellor.

This was a proceſs much in uſe in caſe of great offenſes, eſpecially about this king's reign, to convict men ſometimes in civil offenſes, ſometimes in caſes criminal upon default of appearance at the return of the proclamation. *Vide Stat.* 5 *H.* 4. *cap.* 6. 11 *H.* 6. *cap.* 11.

But this attainder doth not exclude the offender from clergy. *Co. P. C. cap.* 43. *p.* 104.

12 *E.* 4. *cap.* 5. All wools, woolfells, morling and ſhorling of *Weſtmorland*, *Cumberland*, *Northumberland* and *Durham*, to be ſhipped out, ſhall be ſhipped at *Newcaſtle* upon *Tine*, and thence to *Calais* or *Middleborough*, there to be ſtapled and uttered, and all other wools, woolfells, morling and ſhorling, to be conveyd only to the ſtaple of *Calais*; if any attempt to the contrary, it ſhall be felony, ſaving the king's prerogative to licenſe tranſportation elſewhere. This act to continue for five years only, and ſo it expired.

17 *E.* 4. *cap.* 1. If any ſhall carry or cauſe to be carried out of this realm or *Wales* any manner of money of the coin of this realm, or any other realm, plate, veſſel, maſs bullion, jewels of gold wrought or unwrought, or ſilver without the king's licenſe, except the perſons diſpenſed with by the ſtatute of 2 *H.* 6. *cap.* 6. it ſhall be felony.

This act was to continue only for ſeven years.

And by the act of 4 *H.* 7. *cap.* 23. it was re-enacted again to continue twenty years, and by the ſtatute of 1 *H.* 8. *cap.* 13. it was continued till the next parliament, (*f*) and then diſcontinued; but by the act of 7 *E.* 6. *cap.* 6. it was revived for twenty years, and then expired; ſo that at this day the exportation of gold and ſilver is not felony, but remains only under the penalty of thoſe ſtatutes, that prohibit its exportation

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(*f*) But not as to the penalty of felony, for that is excepted in the act.

tion under pains of forfeiture; for the act of 17 *E.* 3. did not make exportation felony. (*g*) And having this occaſion I ſhall here once for all give an account of the laws in force againſt the exportation of money and bullion.

By the ſtatute of 9 *E.* 3. *cap.* 1. None are to carry any ſterling out of the realm of *England*, nor ſilver in plate, nor veſſel of gold or ſilver, upon pain of forfeiture of the ſame, that he ſhall ſo carry without the king's licenſe; this is confirmd in ſubſtance by 38 *E.* 3. *cap.* 2. 5 *R.* 2. *cap.* 2.

By the ſtatute of 2 *H.* 4. *cap.* 5. If any gold or ſilver be found in the keeping of any upon his paſſage over ſea, in any ſhip or veſſel to go out of any port or creek without the king's licenſe, it ſhall be forfeit, ſaving his reaſonable expenſes.

Merchants ſtrangers to lay out one half of the proceed of their merchandize upon *Engliſh* merchandize, and may carry over the other moiety.

By the ſtatute of 4 *H.* 4. *cap.* 15. All merchants and ſtrangers and others, that ſell merchandizes here, ſhall lay out the money thereby ariſing in other merchandizes of *England*, to carry the ſame without carrying any gold or ſilver in coin, plate or maſs out of this realm, upon pain of forfeiting all the ſame, ſaving always their reaſonable expences.

This act is ſtill in force, and received a farther confirmation by the ſtatute of 5 *H.* 4. *cap.* 9. 9 *H.* 5. *cap.* 1.

2 *H.* 6. *cap.* 6. No gold or ſilver to be carried out of the realm contrary to the former ſtatutes, except for payment of the king's ſoldiers, upon pain of forfeiture of the value of the ſum ſo carried, one fourth part to the diſcoverer, except ranſom of priſoners, and money that ſoldiers carry for their neceſſary coſts, and for horſes and ſheep bought in *Scotland*.

3 *H.* 7. *cap.* 8. All forein merchants ſhall employ their money received in ports, *&c.* upon merchandize or commodities of this realm, the proof to lie upon the merchant, upon pain of forfeiture of all his goods, and a year's impriſonment. This clauſe of the ſtatute of 17 *E.* 4. made perpetual.

19 *H.*

(*g*) Except in the ſearcher, if he confederated with any to export it.

19 *H.* 7. *cap.* 5. None to convey any coin, bullion or plate, above the value of 6 *l.* 8 *d.* out of this realm into *Ireland*, nor convey such bullion, plate or coin into any ship, boat or other vessel, upon pain of forfeiture thereof, and making fine and ransom at the king's will.

So these several statutes be in the way of transportation of bullion or coin, tho the act of 17 *E.* 4. and other acts making it felony are now expired. (*b*)

CHAP. LXIII.

Concerning the new felonies *enacted in the times of* R. 3. H. 7. H. 8. E. 6. *and Queen* Mary.

I Find no new felony enacted in the short reign of *R.* 3.

By the statute of 1 *H.* 7. *cap.* 7. "At every time as information shall be made of any unlawful hunting in any "forest, park or warren, by night or with painted faces, to "any of the king's council, or to any of the justices of peace "in the county, where any such hunting shall be had, of "any person so suspected thereof, it shall be lawful to any "of the same council or justices of peace, to whom such in-

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(*b*) By 13 & 14 *Car.* 2. *cap.* 31. The melting down the silver money of this realm is prohibited on pain of forfeiting it and double the value; and by 15 *Car.* 2. *cap.* 7. it is lawful to export foreign coin or bullion, provided an entry be made thereof at the custom-house, but by 6 & 7 *W.* 3. *cap.* 17. and 7 & 8 *W.* 3. *cap.* 19. before the same be shipt, it is necessary there should be a certificate from the lord mayor and court of aldermen of *London*, That oath hath been made before them by the owner of the said bullion, and by two or more credible witnesses, that the said bullion and every part thereof is foreign bullion, and that no part thereof was the coin of this kingdom, or clippings thereof, or plate wrought within this kingdom.

" formation ſhall be made, to make a warrant to the ſheriff " of the county, conſtable, bailiff, or other officer with- " in the ſame county, to take and arreſt the ſame per- " ſon or perſons, of whom ſuch information ſhall be made, " and to have him or them before the maker of the ſaid " warrant, or any other of the king's ſaid council or juſtices of " peace of the ſame county; and that the ſaid counſellor or " juſtice of peace, before whom ſuch perſon or perſons ſhall " be brought, by his diſcretion have power to examine him " or them ſo brought of the ſame hunting, and of the ſaid " doers in that behalf; and if the ſame perſon wilfully con- " ceal the ſame hunting or any perſon with him defective " therein, that then the ſame concealment be againſt every " perſon ſo concealing felony; the ſame felony to be in- " quired of and determind as other felonies within this realm " have uſed to be; and if he *then* confeſs the truth, and all " that he ſhall be examind of and knoweth in that behalf, " that then the ſaid offenſes by him done be againſt the king " our ſovereign lord but treſpaſs finable, by reaſon of the " ſaid confeſſion, at the next ſeſſions of the Peace to be hol- " den for the ſame county by the king's juſtices of the ſame " ſeſſions to be there ſeſſed; and if any reſcous or diſo- " beyance be made by any perſon, the which ſo ſhould be " arreſted, ſo that the execution of the ſame warrant thereby " be not had, then the ſame reſcous and diſobeyance be fe- " lony inquirable and determinable, as is aforeſaid; and if " any perſon be convict of ſuch hunting with painted faces, " vizors, or otherwiſe diguiſed to the intent he ſhould not " be known, or of any unlawful hunting in the night, then " the ſame perſon ſo convict to have ſuch puniſhment, as " he ſhould have, if he were convict of felony. (*a*)

My lord *Coke*, *P. C. cap.* 21. hath given us the whole learning of this ſtatute, *viz.*

(*a*) But now by 9 *Geo.* 1. *cap.* 22. (continued by 6 *Geo.* 2. *cap.* 37.) it is made felony without benefit of clergy for any perſon being armed with any offenſive weapons, and having their faces blacked or diſguiſed, to appear in any foreſt, chaſe, *&c.* or unlawfully to hunt, kill or ſteal any deer, or rob any warren, or ſteal fiſh out of any river or pond, or for any perſon unlawfully to hunt any deer in the king's foreſts, *&c.* or maliciouſly to break down the head of any fiſh-pond, whereby the fiſh ſhall be loſt or deſtroyd.

1. The hunting with vizors or painted faces in the day-time, and the hunting in the night with or without ſuch vizors is felony; but the party may make it treſpaſs only, if he pleaſe. *Dy.* 50. *a.*

2. It doth not extend to the foreſt, or chaſe, or park of the king's, (*b*) nor to foreſts, parks, or warrens in reputation only, and not in right.

3. The complaint may be made to any one juſtice of peace or of the council, and the warrant may be granted by any one.

4. The warrant muſt be in writing under ſeal, and grounded upon an examination ſhewing a probable cauſe of ſuſpicion.

5. When the offender is brought, he muſt be examind of the fact done by himſelf, and then of the fact done by others, but not upon oath.

6. A hunting without killing is within the penalty.

7. Tho the hunting be not felony, yet the reſcue or diſobeyance is felony.

8. But the reſcue or diſobeyance made felony is only that, which is done by the party, not by a ſtranger.

And altho the party reſcue himſelf, yet if he be re-taken, ſo as execution of the warrant be had, it is no felony.

9. If the party plead not guilty, and is convict of the fact, it is felony; but if he confeſs upon his arraignment, it then becomes only a treſpaſs finable, tho he denied it upon his firſt examination.

10. It is held, that if he confeſs not, but conceal upon his examination before the juſtice, this alone makes it not felony, neither can he be indicted upon this ſtatute for ſuch concealment; but it muſt be a judicial concealment, namely, if being indicted for the hunting he upon his arraignment conceal, then he ſhall be indicted *de novo* for ſuch concealment, and if convict thereof, he ſhall be attaint of felony for concealment, tho this ſeems a difficult expoſi-

3 tion,

(*b*) As to this caſe a remedy was provided by 31 *H.* 8. *cap.* 12. whereby this offenſe, if committed in the king's foreſts, *&c.* is abſolutely made felony, but that ſtatute being repealed by the general clauſe of 1 *E.* 6. *cap.* 12. a remedy was again provided by the ſtatute of 9. *Geo.* 1. above mentiond.

tion, (c) for upon his arraignment for the hunting he only anſwers to that indictment, and is not examind touching others; and beſides, if he be indicted for the hunting, if there be evidence to convict him of the fact, he is convict of felony before the indictment for concealment come; and if there be not evidence to convict him of the principal, how ſhall there be evidence to convict him of the concealment?

11. The concealment, that makes a felony, muſt be a wilful concealment.

By the ſtatute of 3 *H.* 7. *cap.* 2. It is enacted, "That "whereas women, as well maidens, as widows and wives "having ſubſtances, ſome in movable goods, ſome in lands "and tenements, and ſome being heirs apparent to their an-"ceſtors, had been often taken by miſdoers contrary to their "wills, and after married to ſuch miſdoers, or to others by "their aſſent, or defiled to the great diſpleaſure of God, "contrary to the king's laws and diſparagement of the ſaid "women, and utter heavineſs and diſcomfort of their friends, "and to evil example of others, it is therefore ordained, "eſtabliſhed and enacted by our ſovereign lord the king, by "the advice of the lords ſpiritual and temporal and com-"mons in the ſaid parliament aſſembled, and by authority "of the ſame, That what perſon or perſons from henceforth "taketh any woman *ſo* againſt her will unlawfully, that is "to ſay, maid, widow, or wife, that *ſuch* taking, procuring, "abetting to the ſame, and alſo receiving wittingly the ſame "woman *ſo* taken againſt her will, and knowing the ſame, "be felony; and that ſuch miſdoers, takers and procura-"tors to the ſame, and receivers, knowing the ſame offenſe "in form aforeſaid, be henceforth reputed and judged as "principal felons. Provided that this act extend not to any perſon

(c) This difficulty ariſes from the aforeſaid conſtruction of the act, that it muſt intend a judicial concealment, whereas the act ſeems plainly to mean a concealment upon his examination before the juſtice; for after the act had given power to the juſtice to examine the ſuſpected perſon, it immediately adds, *and if the ſame perſon wilfully conceal, &c. the ſaid concealment ſhall be felony, and if he* then *confeſs the truth, and all that he ſhall be examind of, his offenſe ſhall be but treſpaſs*; the word *then* ſhows the time of confeſſion to be at the examination, and therefore the concealment likewiſe muſt be intended to be at that time.

" perſon taking any woman, only claiming her as his ward or " bond-woman.

For the making of a felony within this ſtatute there muſt be theſe circumſtances on the part of the woman: 1. That the maid, wife, or widow have ſubſtance of goods or lands, or be heir apparent. 2. That ſhe be taken away againſt her will. 3. That ſhe be married to or defiled by the miſdoer or ſome other by his conſent. Without theſe three concurring it makes no felony within this ſtatute, 3 & 4 *P. & M. Daliſon* 22. 4. That ſhe be not in ward, or a bond-woman to the perſon that taketh her, or cauſeth her to be taken only as his ward or bond-woman. *Co. P. C. cap.* 12. *p.* 61.

In *Fulwood's* caſe, *M.* 13. *Car.* 1. *B. R. Cro. p.* 482, 484, 488, 492, theſe points were reſolved: 1. That if a woman be taken away forceably in the county of *Middleſex*, and married in the county of *Surry*, the fact is indictable in neither county; for the taking without the marriage, nor the marriage without the taking make not felony. 2. But if ſhe were taken in the county of *Middleſex*, and carried into the county of *Surrey*, ſo that it is a continuing force in *Surrey*, tho begun in *Middleſex*, and then ſhe is married in *Surrey*, there the offender may be indicted upon this ſtatute in *Surrey*. 3. Tho poſſibly the marriage or the defilement might be by her conſent, being won thereunto by flatteries after the taking, yet this is felony, if the firſt taking away were againſt her will. (*d*) 4. That if as well the marriage as the taking away were againſt her will, ſo that the marriage was voidable, yet it is a marriage *de facto*, and therefore being taken away againſt her will, and alſo married againſt her will, it is felony within this ſtatute. 5. That it is not neceſſary in the indictment to ſay, that ſhe was taken *eâ intentione* to marry or defile her, becauſe the ſtatute hath no ſuch words of *eâ intentione*. But farther, he marrying her the ſame day he took her, it muſt needs appear, that it was *eâ intentione*; yet theſe words, *eâ intentione ad ipſam maritand'*, are uſually added in indictments upon this ſtatute, and it is ſafeſt ſo to do. 6. That the

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(*d*) And ſo it was reſolved in *Swendſen's* caſe, *M.* 1 *Ann. Stat. Tr. Vol.* V. *p.* 468. in which caſe moſt of the other points here mentiond were likewiſe ruled.

the woman thus taken away and married may be ſworn and give evidence againſt the offender, who ſo took and married her, tho ſhe be his wife *de facto*.

And all theſe points were accordingly reſolved *H.* 24 & 25 *Car.* 2. in *Brown*'s caſe (*e*) upon this ſtatute, only the indictment ran, *cepit eâ intentione ad ipſam maritandam*: The offender was convict and executed: and the reaſons why the woman was ſworn and gave evidence in the caſe of *Brown* were, 1. Becauſe the taking away of the woman and marrying were the ſame day, and ſhe was reſcued out of their hands, and the offender taken the next day, and ſo all done *flagrante crimine*. 2. It was but a forced marriage, and ſo no marriage *de jure*. 3. There was no cohabitation. 4. Concurring evidence to prove the whole fact. But had ſhe freely without conſtraint lived with him, that thus married her, any conſiderable time, her examination in evidence might be more queſtionable.

By the ſtatute of 39 *Eliz. cap.* 9. Clergy is taken away from the principals, procurers, and acceſſaries before the offenſe committed.

By this act of 3 *H.* 7. the procurers, as well as the miſdoers themſelves, and any perſon, that receives the woman thus taken away, are principals by this ſtatute, and ſo ouſted of clergy; but he, that receives the offender knowingly, is only acceſſary after, and not excluded from clergy.

Quære, whether tho the receiver of the woman be made principal by the act of 3 *H.* 7. he were intended to be ouſted of clergy by 39 *Eliz. cap.* 9.

The ſtatute of 3 *H.* 7. *cap.* 14. recites, "That foraſmuch "as by quarrels made to ſuch as have been in great autho- "rity, office, and of council with the kings of this realm, "hath enſued the deſtruction of the kings and undoing of "this realm, ſo as it hath appeard evidently, when com- "paſſing of the death of ſuch as were the king's true ſub- "jects was had, the deſtruction of the prince was imagined "thereby, and for the moſt part it hath grown by the ma- "lice of the king's own houſhold ſervants, as now of late ſuch

(*e*) 3 *Kel.* 193. 1 *Ven.* 243.

" a thing was like to have enſued; and foraſmuch as by the
" law of this land, if actual deeds be not had, there is no
" remedy for ſuch falſe compaſſings, imaginations and con-
" federacies had againſt any lord, or any of the kings coun-
" cil, or any of the king's great officers in his houſhold, as
" ſteward, treaſurer, comptroller, and ſo great inconveniences
" might enſue, if ſuch ungodly demeaning ſhould not be
" ſtraitly puniſhed before that actual deed were done, there-
" fore it is ordained by the king and the lords ſpiritual and
" temporal, and the commons of the ſaid parliament aſſem-
" bled, and by authority of the ſame, that from henceforth
" the ſteward, treaſurer, and comptroller of the king's houſe
" for the time being, or one of them, ſhall have full power
" and authority to inquire by twelve ſad men and diſcreet
" perſons of the chequer roll of the king's houſhold, if any
" perſon admitted to be his ſervant, ſworn, and his name
" put into the chequer roll of his houſhold, whatſoever he
" be, ſerving in any manner, office or room, reputed, had
" or taken under the ſtate or degree of a lord, make any con-
" ſpiracies; compaſſing, confederacies or imaginations with any
" perſon or perſons, to deſtroy or murder the king or any lord
" of this realm, or any other perſon ſworn to the king's coun-
" cil, ſteward, treaſurer, or comptroller of the king's houſe,
" that if it be found before the ſaid ſteward for the time
" being by the ſaid twelve ſad men, that any ſuch of the
" king's ſervants, as is aboveſaid, hath confederated, compaſ-
" ſed, conſpired or imagined, as is aboveſaid, that he ſo found
" by that inquiry be put thereupon to anſwer, and the
" ſteward, treaſurer and comptroller, or two or them, have
" power to determine the ſame matter according to the law;
" and if he put him in trial, that then it be tried by other
" twelve ſad men of the ſame houſhold; and that ſuch miſ-
" doers have no challenge, but for malice. And if ſuch
" miſdoers be found guilty by confeſſion or otherwiſe, that
" the ſaid offenſe be judged felony, and they to have judg-
" ment and execution as felons attaint ought to have by the
" common law.

Vide the obſervations of my lord *Coke* upon this act, *Co. P. C. cap.* 4. where on the part of the offender there muſt be theſe qualifications, *viz.* 1. He muſt be the king's ſworn ſervant. 2. His name muſt be in the chequer roll. 3. He muſt be under the degree of a lord. 4. Tho his conſpiring with another not of the houſhold be an offenſe, yet he only of the houſhold is the felon.

On the part of the perſon, againſt whom the conſpiracy is, are theſe requiſites: 1. The conſpiracy to murder the king; or, 2. A lord of the realm, but yet only ſuch as is ſworn of the king's privy council. 3. Any other of the king's privy council, tho under the degree of a lord. 4. The ſteward, treaſurer, or comptroller of the king's houſe, tho neither a lord nor of the privy council.

The power to hear and determine. 1. The ſteward, treaſurer and comptroller, [or any two of them, have power to determine,*] tho the act ſaith, they or any one of them may inquire. 2. If a ſervant of the king's houſe, *ut ſupra*, conſpire the death of the ſteward, treaſurer and comptroller, yet they remain the only judges in this cauſe by this act, tho they may take others to their aſſiſtance, yet none but they ſit as judges. 3. The preſentment and trial muſt be only by the ſervants of the houſhold. 4. The inquiry may be by twelve or more, but the trial only by twelve. 5. No challenge but for malice. 6. The conſpiracy muſt be plotted in the king's houſhold. 7. The offender is to have his clergy.

And *note*, this being a new made felony, and the manner of its determination particularly limited, it is not determinable before any other judges, or in any other courts, neither in the king's bench, over and terminer, or gaol-delivery. *Quare*, whether their ſeſſion muſt not be in the king's houſe.

By the ſtatute of 7 *H.* 7. *cap.* 1. There is proviſion of felony againſt captains and ſoldiers leaving their ſervice; but this I ſhall take up hereafter, as alſo the ſtatute of 3 *H.* 8. *cap.* 5. which I ſhall refer to 4 *&* 5 *P. & M. cap.* 3.

I come

* The words here in the MS. are, *Or any one or any two of them have power to inquire*, but they ſeem plainly to have been ſo written by miſtake, the ſenſe requiring them to be as above.

I come to the time of *H.* 8. which was fruitful in enacting new treaſons and new felonies, and new offenſes as to *Præmunire.*

But there were two acts of parliament, that repeald as all new treaſons and miſpriſions of treaſons, ſo all new felonies enacted at any time after the firſt day of the reign of *Henry* 8. *viz.*

1 *E.* 6. *cap.* 12. Whereby it is enacted, "That all offenſes "made felony by any act or acts of parliament made ſince "the 23d day of *April* in the firſt year of the reign of king "*H.* 8. not being felony before, and alſo all and every "the branches and articles mentiond, or in any ways declared "in any of the ſaid ſtatutes concerning the making of any "offenſe or offenſes to be felony, not being felony before; "and all pains and forfeitures concerning the ſame or any of "them ſhall from henceforth be repeald, and utterly void "and of none effect.

1 *Mar. cap.* 1. Whereby it is enacted, "That all offenſes "made felony, or limited to be within the caſe of *Præmunire*, "by any act or acts of parliament, ſtatute or ſtatutes made "ſince the firſt day of the firſt year of the reign of king *Hen-*"*ry* 8. not being felony before, nor within the caſe of *Præ-*"*munire*, and all and every branch, article and clauſe men-"tiond, or in any ways declared in any of the ſaid ſtatutes "concerning the making of any offenſe or offenſes to be fe-"lony, or within the caſe of *Præmunire* before, and all pains "and forfeitures concerning the ſame or any of them ſhall "from henceforth be repeald and utterly void, and of none "effect.

The former of theſe ſtatutes, and alſo the latter repeald all new felonies enacted in the time of *H.* 8. who began his reign *April* 22. 1509. And the latter of theſe ſtatutes repeald alſo the new created felonies in the reign of *E.* 6.

But neither of theſe ſtatutes did extend to piracy or robbery upon the ſea, nor any ſuch act as concerned matter of proceedings touching felonies, that were ſuch before the time of *H.* 8. and therefore thoſe ſtatutes in the time of *H.* 8. that concerned clergy, ſanctuary, peremptory challenge, place or

manner of trial of felons, or the erecting of new juriſdictions for their trial, as that of 33 *H.* 8. *cap.* 12. for felonies in the king's court; for theſe acts were not conſtitutive of new felonies, but only directions of the courſe of proceedings in caſes of old felonies.

Thoſe ſtatutes, that made new felonies both in the time of *H.* 8. and *E.* 6. are therefore of theſe kinds, *viz.*

1. Such as were enacted *de novo* in the times of *H.* 8. and *E.* 6. and were never after revived or re-enacted by any ſubſequent act of parliament; ſuch were thoſe of 31 *H.* 8. *cap.* 2. of breaking the heads of ponds, and taking fiſh, 31 *H.* 8. 12. and 32 *H.* 8. *cap.* 11. ſtealing of hawks eggs, and hunting in the king's foreſts, *&c.* 33 *H.* 8. *cap.* 8. of witchcraft. 33 *H.* 8. *cap.* 14. of prophecies. 37 *H.* 8. *cap.* 6. The burning of a frame of timber. 37 *H.* 8. *cap.* 10. Libellous papers charging men to have ſpoken treaſon. 23 *H.* 8. *cap.* 11. Breaking priſon.

2. Such as were repeald but enacted again in the ſame kind, but with ſome alterations, as 22 *H.* 8. *cap.* 10. concerning *Egyptians*, altered by 1 *&* 2 *P. & M. cap.* 4. and by 5 *Eliz. cap.* 20.

3. Such as were *de novo* enacted to be felonies in the times of *H.* 8. and *E.* 6. and repeald, but re-enacted again, as 22 *H.* 8. *cap.* 11. touching cutting of *Powdike*, renewed by 2 *&* 3 *P. & M. cap.* 19. 3 *H.* 8. *cap.* 5. concerning ſoldiers, re-enacted in a great meaſure by 2 *E.* 6. *cap.* 2. and 4 *&* 5 *P. & M. cap.* 3. 21 *H.* 8. *cap.* 7. ſervants embezzling their maſters goods, by 5 *Eliz. cap.* 10. 25 *H.* 8. *cap.* 6. concerning buggery, by 5 *Eliz. cap.* 17. 23 *H.* 8. *cap.* 16. concerning *Scotchmen*, re-enacted by 1 *Eliz. cap.* 7. but finally repeald by 4 *Jac.* 1. *cap.* 1.

4. Some offenſes were made felony by former acts of parliament before *H.* 8. but had additions to them, extending the felonies farther than the old acts, ſome ſuch thing may be found in the ſtatute of 3 *H.* 8. *cap.* 5. concerning ſoldiers in relation to the ſtatute of 7 *H.* 7. *cap.* 1. and then the old felonies ſtand, but the additional felonies are repeald.

Concerning the firſt of theſe ranks of acts I ſhall ſay nothing, becauſe they are now utterly void; but concerning the other three ranks of ſtatutes, I ſhall proceed according to their order of time.

Firſt, for the ſtatute of 3 *H.* 8. *cap.* 5. as alſo that of 2 *E.* 6. *cap.* 2. concerning ſoldiers, I ſhall refer them to the ſtatute of 4 *&* 5 *P. & M. cap.* 18.

By the ſtatute of 21 *H.* 8. *cap.* 7. It is enacted, "That "all and ſingular ſervants, to whom any caskets, jewels, mo"ney, goods or chattels by his or their maſters or miſtreſſes "ſhall from henceforth be deliverd to keep, that if any ſuch "ſervant or ſervants withdraw themſelves from their maſters "or miſtreſſes, and go away with the ſaid caskets, jewels, "money, goods or chattels, or any part thereof, to the in"tent to ſteal the ſame and defraud his or their maſters or "or miſtreſſes thereof, contrary to the truſt and confidence "to him or them put by his or their maſters or miſtreſſes, "or elſe being in the ſervice of his or their maſter or mi"ſtreſs, without any aſſent or commandment of his maſter "or miſtreſs, embezzle the ſame caſkets, jewels, money, "goods or chattels, or any part thereof, or otherwiſe con"vert the ſame to his own uſe with like purpoſe to ſteal it, "that if the ſaid caſket, jewel, money, goods or chattels, that "any ſuch ſervant ſhall go away with, or which he ſhall "embezzle with purpoſe to ſteal, as aforeſaid, be of the va"lue of forty ſhillings, or above, that then the ſame falſe, "fraudulent, or untrue act and demeanor ſhall from hence"forth be deemed and adjudged felony, *&c.* Provided it ex"tend not to apprentices, nor to any perſon under the age "of eighteen years; but every ſuch apprentice or perſon "within that age doing that act ſhall be and ſtand in the "like caſe, as they were before the making of this act. This "act to endure till the next parliament.

By the act of 27 *H.* 8. *cap.* 17. Clergy was taken away in this caſe, if the indictment were laid ſpecially upon the act of 21 *H.* 8. and purſuant to the ſame; and by the act of 28 *H.* 8. *cap.* 2. this act of 21 *H.* 8. was made perpetual, but by the act of 1 *E.* 6. *cap.* 12. theſe acts were both repeald.

But again, by the act of 5 *Eliz. cap.* 10. this act of 21 *H.* 8. was re-enacted and revived, yet it did not revive the act of 27 *H.* 8. *cap.* 17. for taking away clergy. 1. Becauſe the words of the reviving act of 5 *Eliz.* revive only the act of 21 *H.* 8. ſpecially and particularly by name, and not any other incident act concerning clergy. And again, 2. Becauſe the acts taking away clergy were ſpecially repeald by the ſtatute of 1 *E.* 6. *cap.* 12. except in thoſe caſes there particularly enumerated, ſo that at this day a party indicted and convict upon this ſtatute hath his clergy. (*f*)

And *note*, that in this caſe and all other caſes of this nature, where a ſtatute is repeald and re-enacted, an indictment or information may conclude either *contra formam ſtatutorum*, or *contra formam ſtatuti*, for it ſhall be intended the laſt ſtatute. And ſo it is, if a ſtatute be but temporary and then expire, and then is re-enacted; but if a ſtatute be continued till the end of the next ſeſſion of parliament, and before that next ſeſſion be ended it is continued over, the indictment may run *contra formam* of the firſt ſtatute, for it never was interrupted, or it may conclude *contra formam ſtatutorum*. *P.* 42 *Eliz. B. R. Dingly* and *Moore*, (*g*) *M.* 31 & 32 *Eliz. B. R. Mill's* caſe.

This ſtatute was introductive of a new law, when the goods were actually deliverd to the ſervant, that goes away with them, for where there is ſuch a delivery it could not at common law be a felony.

But yet a ſervant might be guilty of felony at common law, if he take the goods of his maſter feloniouſly, nay tho they be goods under their charge, as a ſhepherd, butler, *&c. vide ſupra, cap.* 43. *p.* 505. and for this he may be indicted at this day as a felony at common law; and of this felony at common law, an apprentice, or ſervant under the age of eighteen years may be guilty, and indicted thereof at common law.

And therefore tho the ſtatute of 21 *H.* 8. exempt an apprentice, or ſervant under the age of eighteen years from the

(*f*) But by 12 *Ann. cap.* 7. Clergy is in ſuch caſe taken away from facts committed in any houſe or outhouſe, except as to apprentices under the age of fifteen years, robbing their maſters.

(*g*) *Cro. Eliz.* 750.

the pain of felony enacted *de novo* by this ſtatute, namely, where goods are actually deliverd to him, yet it leaves him in the ſame condition, as to any felony at common law, as if he were not excepted; and therefore if my butler or ſhepherd under the age of eighteen years, or if my apprentice take away my goods felonioufly without my actual delivery, tho they are under the value of forty ſhillings, he is indictable of felony at common law.

If I deliver my ſervant a bond to receive money, or deliver him goods to ſell, and he receive the money upon the bond or goods, and go away with it, this is not felony at common law, becauſe the money is deliverd to him, nor felony by this ſtatute, becauſe, tho the bond or goods were deliverd him by the maſter, yet the money was not ſo deliverd by the maſter. *Dy.* 5. *a. Co. P. C. cap.* 44. And yet by the very payment of the money to the ſervant to the maſter's uſe, the maſter is by law ſaid to be actually poſſeſſed of this money; and if taken away from the ſervant by a treſpaſſer or robber, the maſter may have a general action of treſpaſs, or action upon the ſtatute of hue and cry.

But it is held, that if the maſter deliver to the ſervant twenty pounds in ſilver to change it into gold at the goldſmith's, or leather to make ſhoes, and he run away with the gold or ſhoes, it is felony. *Crompt. Juſtic.* 35 *b.*

If *A.* hath two ſervants, *B.* and *C. B.* by the command of *A.* the maſter and in his preſence delivers the maſter's goods to *C.* by the maſter's command, and *C.* runs away with it, this is felony within the ſtatute, for it is the maſter's delivery; but ſuppoſe it be deliverd by the maſter's command, but in the maſter's abſence, *quære*, whether this be within the ſtatute, and what difference there is between this caſe and the receiving money from a creditor by the maſter's directions, yet *vide Dy.* 5. it ſeems felony.

If the maſter's wife deliver goods of the maſter to the ſervant to keep, and he goes away with it, it ſeems this is within the ſtatute, for he hath them by delivery of his miſtreſs, and the maſter's wife is as well his miſtreſs, as if ſhe were ſole, *vide* ſtatute 25 E. 3. for petit treaſon.

By the ſtatute of 22 *H.* 8. *cap.* 11. Every perverſe and malicious cutting down of the new *Powdike* of *Marſhland*, or of the old *Powdike* of the iſle of *Ely*, or of any part thereof, or of any other bank, being part of the rind and uttermoſt part of the country of *Marſhland*, made for the defenſe thereof, other than working upon the ſame for repairing or amending and fortifying thereof, is enacted to be felony.

This act was repeald by 1 *E.* 6. *cap.* 12. and 1 *Mar.* *cap.* 1. but is revived by 2 & 3 *P.* & *M.* *cap.* 19. and ſo continues.

But the offender hath the benefit of clergy.

By the ſtatute of 23 *H.* 8. *cap.* 16. The ſelling of a horſe to a *Scotchman*, or delivering a horſe in *Scotland* is made felony.

This was repeald by 1 *E.* 6. *cap.* 12. and tho made penal by the act of 1 *E.* 6. *cap.* 5. yet never revived, (*b*) and the acts of this kind are repeald by 4 *Jac.* 1. *cap.* 1. as to *Scotland*.

By the act of 25 *H.* 8. *cap.* 6. buggery with mankind or beaſt is enacted to be felony, and the felon excluded from clergy.

This ſtatute was repeald by the general act of 1 *E.* 6. *cap.* 12. and in 2 *E.* 6. *cap.* 29. it was enacted to be felony without clergy, but without loſs of lands or goods or corruption of blood.

But this act of 2 *E.* 6. was repeald by the ſtatute of 1 *Mar.* *cap.* 1. and ſo both acts ſtood repeald until 5 *Eliz.*

But by the ſtatute of 5 *Eliz.* *cap.* 17. the entire act of 25 *H.* 8. *cap.* 6. is revived and re-enacted, ſo that this offenſe ſtands at this day abſolutely felony without benefit of clergy.

To make buggery there muſt be *penetratio*, as in caſe of rape. *Vide ſupra*, *p.* 628.

A woman may be guilty of buggery with a beaſt within this ſtatute.

(*b*) This muſt be ſome miſtake in the MS. for this ſtatute was revived, as our author himſelf ſays a little above, *p.* 665. by 1 *Eliz.* *cap.* 7. tho afterwards repeald by 4 *Jac.* 1. *cap.* 1.

If buggery be committed upon a man of the age of diſcretion, both are felons within this law.

But if with a man under the age of diſcretion, *viz.* fourteen years old, then the buggerer only is the felon.

Thoſe, that are preſent aiding and abetting, are all principals; the ſtatute making it felony generally, there are or may be acceſſaries before and after, as in caſe of rape. But tho none of the principals are admitted to their clergy, yet acceſſaries before and after are not excluded from clergy.

Touching the time of *E.* 6. I do not find any new felony enacted, but that of 2 & 3 *E.* 6. *cap.* 6. which I ſhall hereafter conſider, when I come to 4 & 5 *P.* & *M. cap.* 3.

In the time of queen *Mary* we find theſe ſtatutes following making new felonies.

By the ſtatute of 1 & 2 *P.* & *M. cap.* 4. "If any outlandiſh people calling themſelves or being called *Egyptians* ſhall "remain in this realm or *Wales* one month at one or ſeveral times. And if any perſon being fourteen years old, "which hath been ſeen or found in the fellowſhip of ſuch "*Egyptians*, or which hath diſguiſed him or herſelf like them, "ſhall remain here or in *Wales* one month either at one or "ſeveral times, it is felony. (*i*)

The trial to be by the inhabitants of the county, where they are taken, and not *per medietatem linguæ*, no ſanctuary or clergy to be allowd.

A proviſo, that it extend not to their children under thirteen years old.

And by the ſtatute of 5 *Eliz. cap.* 20. the act of 1 & 2 *P.* & *M.* is confirmed and extended to all above the age of fourteen years, that ſhall be found in the company of vagabonds, commonly called or calling themſelves *Egyptians*, or counterfeiting or diſguiſing themſelves by their apparel, ſpeech or behaviour like them, if they continue one month, altho they are perſons born in the king's dominions. Clergy is ouſted.

4 I have

(*i*) Our author has here copied from *Co. P. C. cap.* 29. where the two ſtatutes of 1 & 2 *P.* & *M.* and 5 *Eliz. cap.* 20. are blended together; for this laſt clauſe and the words *at one or ſeveral times* in the firſt clauſe belong to 5 *Eliz.* and not to 1 & 2 *P.* & *M.*

I have not known theſe ſtatutes much put in execution, only about twenty years ſince at the aſſizes at *Bury* about thirteen were condemned and executed for this offenſe.

I am now come to that, which I have all along promiſed, namely, the felony of ſoldiers running from their captains, enacted by ſeveral ſtatutes, as namely, 18 *H.* 6. *cap.* 19. 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. 2 *&* 3 *E.* 6. *cap.* 2. repeald by 1 *Mar. cap.* 1. and revived by 4 *&* 5 *P. & M. cap.* 5. and the ſtatute of 5 *Eliz. cap.* 5.

I ſhall take up the whole matter together, beginning with the antienter ſtatutes, and ſo deſcending downwards to the latter.

By the ſtatute of 18 *H.* 6. *cap.* 18. It is recited, "That "divers captains, that were retaind by indenture to ſerve the "king, ſome beyond the ſeas and ſome in the marches, had "defrauded the ſoldiers under their retinue of their pay, "and enacts, that no captain, which ſhall have the conduct "of ſuch retinue, and ſhall receive the king's wages for the "ſame, ſhall abate his ſoldiers their wages, except it be for "their clothing, that is to ſay, if they ſhall be waged for "half a year, ten ſhillings a gown for a gentleman, ſix ſhil- "lings and eight pence for a yeoman, upon pain to forfeit "twenty pounds for a ſpear, ten pounds for a bow to the "king, for whom he did abate.

And by the ſtatute of 18 *H.* 6. *cap.* 19. It is recited and enacted, as followeth, "Whereas many ſoldiers, which "have taken parcel of their wages of their captains, and ſo "have muſter'd and been entred of record the king's ſol- "diers before his commiſſioners for ſuch terms, for which "their maſters have indented, have ſometimes preſently af- "ter their muſter and receiving part or all of their wages "departed and gone where they will, and have not paſſed "the ſea with their captains, and ſome paſſed the ſea, and "long within their terms departed form their captains and "the king's ſervice without apparent licenſe to them grant- "ed by their captains, to the great damage, *&c.* it is enact- "ed, that every man *ſo*(*k*) muſtering and receiving the king's wages,

(*k*) This word [ſo] reſtrains the ſtatute to ſoldiers retaind in the manner mentiond in the act, which method of retainer being now diſuſed, this ſtatute is conſequently become of little force.

" wages, which departeth from his captain within his term " in any manner aforeſaid, (except notorious ſickneſs by the " viſitation of God ſuffer him not to go, and which he ſhall " certify preſently to his captain, and repay his money, ſo " that he may provide him for another ſoldier in his place,) " he ſhall be puniſhed as a felon, and the juſtices of the " peace ſhall have power to hear and determine the ſame; and " that no ſoldier, man of arms or archer ſo muſterd of re- " cord and going with his captain beyond the ſea ſhall re- " turn into *England* within the term for which his captain " hath retaind him, nor leave his captain there in the king's " ſervice, and in adventure of the war, except he hath rea- " ſonable cauſe by him ſhewed to his captain, and by him " to the chief in the country having royal power, and there- " upon ſhall have a licenſe of the ſaid captain witneſſed under " his ſeal, and ſhewing the cauſe of his licenſe; and if any " that doth muſter of record come without letters teſtimonial " of his captain within his term on this ſide the ſea, the may- " ors, *&c.* ſhall arreſt them, and detain them until it be in- " quired of, and if it be found by inquiry before the juſtice " of peace, and proved, that they have muſterd of record " and departed from their captains without licenſe, as afore- " ſaid, they ſhall be puniſhed as felons." But it took not away clergy.

By this act it appears, that the method of thoſe times was, that as well the ſoldiers as the captains were under a contract to ſerve in the war, ſome for longer time, ſome for ſhorter, and ſometimes the ſubordinate ſoldiers contracted with the king, but moſt commonly the captain contracted with the king to ſerve him with ſuch a number of men raiſed by himſelf for ſuch a time, as half a year or the like, and the captain made his contract with his ſoldiers (therefore called his retinue), and the captain received the pay for himſelf and them.

And this method continued until 7 *H.* 7. and for a long time after, as appears by the whole preamble and body of the ſtatute of 7 *H.* 7. *cap.* 1.

By that ſtatute it is enacted, "That every captain and "petit captain having under them retinue of any ſoldier or "ſoldiers at the king's wages ſhall, under pains in the ſame "act limited, pay to their retinue of ſoldiers their wages rate-"ably, as it is allowd by the king or the treaſurer of his "wars, and that within ſix days next after they have re-"ceived it; and if any ſoldier, being no captain, imme-"diately retaind with the king, which hereafter ſhall be in "wages and retaind, or take any *preſt* to ſerve the king "upon the ſea or upon the land beyond the ſea, depart "out of the king's ſervice without licenſe of his captain, "that ſuch departing be felony without the privilege of cler-"gy; and the juſtices in every ſhire, where ſuch offender is "taken, ſhall hear and determine the offenſe, as if done in "the ſame county; and their departure and retainer, if tra-"verſed, ſhall be tried in the ſame county, where taken." But this act extended not to ſoldiers impreſted to ſerve in *England.*

By this ſtatute it appears, that the retainer of the captain was by contract with the king, and he by the ſame contract was to provide the ſoldiers, which were to be at the king's pay. This is continued alſo till 3 *H.* 8. as appears by the preamble and body of the act of 3 *H.* 8. *cap.* 5.

By that act of 3 *H.* 8. *cap.* 5. The ſame puniſhment is enacted upon ſoldiers departing without licenſe, only here it is without licenſe of the king's lieutenant.

By the ſtatute of 7 *H.* 7. It is receiving wages or *preſt* to ſerve the king upon or beyond the ſea, here it is to ſerve the king upon the ſea, or upon the land, or beyond the ſea, which is larger than 7 *H.* 7. for it extends to land ſervice, and the puniſhment is limited to the juſtices of the peace of the counties where taken.

Proviſo, that it extend not to captains or ſoldiers retaind to ſerve in *Calais, &c. Berwick* or *Wales.*

It is reſolved 6 *Co. Rep.* 27. *a.* in the caſe of ſoldiers, that both theſe ſtatutes have continuance, and the word (*king*) extends to the ſucceſſors of thoſe kings, (*m*) and altho by

(*m*) *Vide antea pag.* 100.

the ſtatute of 1 *E.* 6. and 1 *Mar.* all new felonies made ſince the firſt day of the reign of *H.* 8. that were not felonies before, are repeald, yet inaſmuch as the ſtatute of 3 *H.* 8. enacts no new felony, but what was felony by 7 *H.* 7. *cap.* 1. tho it vary as to the perſon, that is to grant the licenſe, and the perſons that are to try it,(*) yet it was in truth no new felony, and therefore it is held the ſtatute of 3 *H.* 8. was not repeald by 1 *Mar.* or 1 *E.* 6.

But it ſeems to me to be repeald by 1 *E.* 6. and 1 *Mar.* for to depart without licenſe of the captain, and to depart without licenſe of the king's lieutenant, are ſeveral offenſes, for ſuppoſe he had the lieutenant's licenſe and not the captain's, it is not excuſe enough within 7 *H.* 7. and if he had the captain's licenſe and not the lieutenant's, it excuſeth not within the ſtatute of 3 *H.* 8. But then *quære*, whether the exception for clergy of men in orders, or of ſoldiers in *Calais*, *Berwick*, or *Wales* extend to the ſtatute of 7 *H.* 7. *cap.* 1.

If this variance by the ſtatute of 3 *H.* 8. be a repeal of the ſtatute of 7 *H.* 7. then they are both repeald, that of 7 *H.* 7. by 3 *H.* 8. and that of 3 *H.* 8. by 1 *E.* 6. and 1 *Mar.*

The ſtatute of 2 & 3 *E.* 6. *cap.* 2. recites, "That whereas "divers of the king's ſubjects according to their bounden "duties have appointed and ſent into the parts beyond the "ſeas and into *Scotland* many able perſons and ſoldiers with "horſes and harneſs meet to ſerve the king in his wars to "their great charges and coſts, yet ſome of the ſoldiers ſo "ſent have contrary to their bounden duty ſold or converted the ſaid horſes and harneſs, whereby the king hath "been deſtitute of their ſervice, and the owners who ſent "them have been deceived of their horſes and harneſs, and "leſs able to refurniſh other like ſoldiers with horſes and "harneſs at ſuch time as they ſhall be commanded by the "King.

It is enacted, "That if any ſoldier hereafter ſerving the "king in his wars in any of his dominions, or on the ſeas, "or beyond the ſeas, ſhall hereafter purloin, &c. ſuch horſes "or arms, he ſhall be committed by the lieutenant, &c.

2 "upon

(*) The perſons impowerd to try it are the ſame by both ſtatutes.

" upon due proof or teſtimony till ſatisfaction, *&c.* And if " any ſoldiers ſerving, as is aforeſaid, depart without licenſe of " his lieutenant or other above-named with booty or other- " wiſe, being in the enemies country or elſewhere in the " king's ſervice, or out of any gariſon, where he or they be " appointed to ſerve, that then every ſuch ſoldier ſo depart- " ing without licenſe ſhall be taken and judged as a felon " without benefit of clergy or ſanctuary; and the juſtices of " every ſhire, where he is taken, ſhall have power to hear " and determine the offenſe, as if committed in the ſame " county.

" Proviſions againſt captains ſhort pay, *&c.* Provided not " to extend to detaining of wages for victuals, harneſs, wea- " pons, or for any *preſt* money provided and deliverd to ſuch " ſoldier.

Nota, This act, tho it vary from the preamble of the other acts of 7 *H.* 7. and 3 *H.* 8. and recites, that the king's ſubjects according to their *bounden duty* had ſent men and ſoldiers, doth not neceſſarily infer a compulſive power upon the perſons ſo to ſend, or ſo to go; 1. Unleſs they were bound by tenure to attend in perſon or ſend; ſuch were tenants by knights ſervice. (*n*) 2. Unleſs obliged by the ſtatute of 11 *H.* 7. *cap.* 18. or 19 *H.* 7. *cap.* 1. as having offices, penſions, or lands given by the king, who by theſe ſtatutes were bound to follow the king in his wars, but at the king's wages, by thoſe ſtatutes, which were held perpetual. 3. Or unleſs they had contracted with the king to find him ſoldiers, for this courſe was not wholly out of uſe, and the preamble ſeems to import as much, for they ſent their ſoldiers, and when they thus departed with their arms were bound to refurniſh others.

And tho there be mention of *preſt* money in this act, yet in truth it was *impreſt* money, or the earneſt of the contract between the king by the captain and the ſoldiers, and not as is now uſed.

But yet upon this act two things are obſervable. 1. That this act did not make the departure of any ſoldier to be felony,

(*n*) See *Co. Lit. p.* 76. *a.* § 103.

lony, unleſs he were actually in the king's ſervice in his wars. 6 *Co. Rep.* 27. *a.* caſe of ſoldiers.

2. Tho this felony was in ſubſtance the ſame, that was enacted by 7 *H.* 7. yet the general clauſe of the act of 1 *Mar. cap.* 1. repeald it.

And this is accordingly ſo recited by the ſtatute of 4 & 5 *P. & M. cap.* 3. which doth recite it to be repeald, and therefore by an expreſs enacting clauſe renews that clauſe of the ſtatute of 2 & 3 *E.* 6. that makes ſuch departure felony.

By the ſtatute of 5 *Eliz. cap.* 5. It is recited, "That it "hath been doubted, whether the ſtatute of 18 *H.* 6. *cap.* 19. "did or ought to extend to mariners and gunners ſerving on "the ſeas taking wages of the king or queen. It is expreſſed, "ordained, and enacted and declared, that the ſaid ſtatute "in all pains, forfeitures and other things did and doth, and "hereafter ſhall extend as well to all and every mariner and "gunner having taken, or that ſhall hereafter take *preſt* or "wages to ſerve the queen, her heirs or ſucceſſors, to all in-"tents and purpoſes, as the ſame did or doth to any ſol-"dier, any diverſity of opinion, doubt, or matter to the "contrary notwithſtanding." But this takes not away the benefit of clergy.

In 6 *Co. Rep.* 27. *a.* The caſe of ſoldiers. The caſe was, that divers ſoldiers after they were preſt, and going towards *Ireland* to ſerve againſt the rebels there, and before they had ſerved in the war, did depart and *eſloigne* themſelves; hereupon it was reſolved by all the judges of *England* 43 *Eliz.* upon a reference to them made, as it ſeems, 1. That this caſe was not within the ſtatute of 18 *H.* 6. but that act is now of little uſe, becauſe that act refers to the antient manner of retaining ſoldiers, which was uſual between the king and great men, to ſerve the king with ſuch a number of men for a certain time. 2. That the ſtatute of 2 & 3 *E.* 6. *cap.* 2. revived by 4 & 5 *P. & M.* extended not to this caſe, for that ſtatute extended to the departure of a ſoldier after he had been in actual ſervice in the war. 3. That the ſtatutes of 7 *H.* 7. *cap.* 1. and 3 *H.* 8. *cap.* 5. which in ſubſtance are

both of one effect, are perpetual laws, and the word *king* extends to his ſucceſſors, and upon thoſe two acts divers ſoldiers were attaint and executed.

The reaſon thereof cannot be grounded upon any ſuppoſition, that the courſe of military retainers was alterd in 7 *H.* 7. from what it was in the time of *H.* 6. for there are very many indentures of retainers of record according to the antient form long after that time, and indeed the ſtatutes of 7 *H.* 7. and 3 *H.* 8. do import as much, as will eaſily appear to an attentive reader of them: But that which ſeems to extend the acts of 7 *H.* 7. and 3 *H.* 8. to this caſe, are the words *or take any preſt to ſerve the king*, which words are in theſe ſtatutes and in that of 5 *Eliz. cap.* 5. which are wanting both in the ſtatute of 18 *H.* 6. *cap.* 19. and 2 & 3 *E.* 6. *cap.* 2. for that makes them ſubject to the penalty for departing without licenſe, as well as if they had received wages, or had been muſterd, or been in actual ſervice in the wars.

All the difficulty reſts in the word *preſt*, *viz.* whether it be to be intended paſſively from *premo, preſſi*, as it is commonly uſed at this day, and is ſo expreſt in the caſe of ſoldiers, *Apres ceo quils fueront preſt*: Or whether to be taken actively, as it is expreſt in the ſtatutes of 7 *H.* 7. 3 *H.* 8. and 5 *Eliz. having taken preſt to ſerve*, &c. *præſtitum*, or the earneſt of their contract (*o*).

All do agree, that if a man do voluntarily receive or take *preſt* to ſerve as a ſoldier, mariner, or gunner, either upon or beyond the ſeas, he is bound thereby, and if he depart

(*o*) Whatever doubts may formerly have been about the meaning of the word *preſt*, yet it ſeems now to be fixt to the latter ſenſe by 5 & 6 *W.* & *M. cap.* 15. for it is there enacted, "That no perſon, "that ſhall be liſted for the land ſervice, "ſhould for the future be eſteemed a "liſted ſoldier, or be ſubject to the penalties of this act, or any other penalty "for his behaviour as a ſoldier, unleſs "before his being liſted or inſerted in "any muſter-roll he ſhall have been "brought before a juſtice of peace, (not "being an officer in the army,) or chief "magiſtrate of ſome city, or high conſtable of the hundred or diviſion, where "the party ſhall be liſted, and before "ſuch juſtice, &c. ſhall declare his free "conſent to be liſted as a ſoldier." Altho the former clauſe of this ſtatute for reviving the puniſhment of mutiny or deſertion be limited to the time mentiond in the act, yet this clauſe coming after that limitation, and being general not only in relation to the penalties of this act, but of any other act, ſeems to be perpetual.

without licenſe, it is felony within the ſtatute of 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. and 5 *Eliz. cap.* 5. for the words of the ſtatutes are expreſs in it, only in the caſe of a ſoldier it is without benefit of clergy, but of a mariner or gunner it is within benefit of clergy, becauſe the ſtatute of 18 *H.* 6. *cap.* 19. doth not exclude clergy, and the ſtatute of 5 *Eliz.* extends only the ſtatute of 18 *H.* 6. to mariners and gunners, and mentions nothing of the ſtatutes of 7 *H.* 7. or 3 *H.* 8. which exclude clergy. But of the buſineſs of clergy hereafter in this chapter.

But on the other ſide the compulſion of men to go beyond or upon the ſea, or otherwiſe impriſoning of them, or compelling men to take *preſt* money, or otherwiſe to impriſon them hath been, I confeſs, a practice long in uſe; how far it is juſtifiable or not, the books that have treated of it are to be conſulted. *Vide* the argument of *Calvin*'s caſe, 7 *Co. Rep.* 7. *b.* He, that reads the comment of my lord *Coke* upon *Confirmatio Cartar. cap.* 5. and his obſervations and concluſions there upon the ſtatutes of 1 *E.* 3. *cap.* 5 & 7. (*p*), 18 *E.* 3. *cap.* 7. (*q*), 25 *E.* 3. *cap.* 8. (*r*), 4 *H.* 4. *cap.* 13. (*ſ*), may reaſonably think he varied his opinion (*t*). And he, that looks upon the acts enabling preſſing of ſoldiers and mariners for forein ſervice upon or beyond the ſea, namely 17 *Car.* 1. *cap.* 12. *cap.* 25. *cap.* 26. may think that thoſe times made

ſome

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(*p*) This ſtatute provides, that no man ſhall be charged to arm himſelf otherwiſe than was formerly wont, and that no man be compeld to go out of his ſhire, but where neceſſity requireth, and ſudden coming of ſtrange enemies into the realm.

(*q*) This ſtatute ordains, that men of arms, &c. choſen to go in the king's ſervice out of *England* ſhall be at the king's wages, till their coming again.

(*r*) This ſtatute enacts, that no man ſhall be conſtraind to find men of arms, other than thoſe who hold by ſuch ſervice, except it be by common aſſent in parliament.

(*ſ*) The deſign of this ſtatute is chiefly to confirm the three acts above mentiond.

(*t*) In *Calvin*'s caſe he was of opinion, that the ſubject is bound to ſerve the king in his wars both within and without the realm; and in his comment upon *confirmatio cartar. cap.* 5. 2 *Inſtit.* 528. he ſays, that the ſtatutes above mentiond, (which provide, that none ſhall be compeld to go to the king's war out of his ſhire, except in caſe of neceſſity, nor ſhall be conſtraind to find men of arms, except by conſent of parliament,) were but declarations of the antient law of *England*. And again, in his comment on *Magna Charta, cap.* 29. 2 *Inſtit.* 47. he ſays, that the king cannot ſend any ſubject againſt his will to ſerve him out of the realm, not even into *Ireland*, for then under pretenſe of ſervice he might ſend him into baniſhment.

ſome doubt of it (*u*). But of this matter I deliver no opinion(*x*). Howſoever to make a felony within thoſe acts of 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. 5 *Eliz. cap.* 5. it muſt be laid in the indictment and proved upon evidence, 1. That either they received wages, or took *preſt* to ſerve the king upon ſea or land. 2. That he, that thus impreſted them, was commiſſiond by the king ſo to impreſt them.

Touching clergy in theſe offenſes.

1. He that is convict upon the ſtatute of 18 *H.* 6. *cap.* 19. ſhall have his clergy. *Co. P. C. cap.* 26.

2. Conſequently a mariner or gunner, that hath taken wages or preſt, ſhall have his clergy, for the ſtatute of 5 *Eliz. cap.* 5. extends only the pains and penalties of the ſtatute of 18 *H.* 6. to this caſe, and by that ſtatute of 18 *H.* 6. clergy was not taken away.

3. That a departing contrary to the ſtatute of 7 *H.* 7. or 3 *H.* 8. is by thoſe ſtatutes exempted from clergy, only the ſtatute of 3 *H.* 8. *cap.* 5. allows men in orders the benefit of clergy.

4. The ſtatute of 2 & 3 *E.* 6. takes away clergy from thoſe, that depart without licenſe after they have ſerved the king in his wars.

5. By the ſtatute of 1 *E.* 6. *cap.* 12. All perſons convict of any felony not excepted in that act, whereof this is none, ſhall have their clergy, as he might have had before 24 *April*, 1 *H.* 8. and therefore an offender againſt 7 *H.* 7. *cap.* 1. is ouſted of his clergy, becauſe ouſted thereof by 7 *H.* 7. *cap.* 1. only if they be in orders, they have privilege of clergy by the ſtatute of 3 *H.* 8. *cap.* 5.

6. But

(*u*) Or rather were clear, that it could not be legally done without a ſpecial act of parliament for that purpoſe; the like may be argued from ſome other temporary ſtatutes enacted ſince our author's time, for authorizing the preſſing of ſoldiers and mariners, *viz.* 2 & 3 *Ann. cap.* 19. 3 & 4 *Ann. cap.* 11. 4 *Ann. cap.* 10. 5 *Ann. cap.* 15. 6 *Ann. cap.* 10.

(*x*) But it may be eaſily perceived, that the reaſon why our author declines delivering any opinion was, becauſe he did not concur with the then prevailing practice, a practice which ſeems repugnant to the liberties of an *Engliſhman*, and irreconcileable to the eſtabliſhed rules of law, *viz.* that a man without any offenſe by him committed, or any law to authoriſe it, ſhould be hurried away like a criminal from his friends and family, and carried by force into a remote and dangerous ſervice.

6. But if he be indicted upon the ſtatute of 3 *H.* 8. *cap.* 5. *quære*, whether he ſhall not have his clergy, for tho the felony in ſubſtance be the ſame, yet this ſtatute makes it felony to depart without the licenſe of the king's *lieutenant*, but the ſtatute of 7 *H.* 7. *cap.* 1. makes it felony to depart without licenſe of the *captain*, and therefore *vide ſupra*, *p.* 674. whether 3 *H.* 8. be not repeald by 1 *E.* 6. as a felony newly made ſince the firſt day of the reign of *H.* 8.

If a man receive impreſt to ſerve the king beyond the ſea, and is deliverd over to a conductor to be brought to a certain place at the ſea-ſide, and is in the king's wages, and runneth away without licenſe of the conductor, all beſides [*Croke*,] *Yelverton*, and *Hutton*, agreed it to be felony, and the conductor is as to this purpoſe a captain; but all agreed, that if the conductor at the place deliver him over to another conductor, this ſecond conductor is not a captain within the ſtatute (*y*); but *Yelverton* and *Hutton* held, that in neither caſe it is felony, unleſs the conductor be alſo a captain, and ſo named in the indenture between the king and him, which all agreed to be the ſafeſt way.

It was held, that it could not be tried before other juſtices, than ſuch as are limited by the act, becauſe a new felony, and limited to be tried in another manner than the law directs, *viz.* in the county where taken. *M.* 3 *Car. Hutt. Rep.* 134. nine judges *verſus Croke*, *Hutton*, and *Yelverton*, *vide Cro. Car.* 71. the better [greater] opinion was, that it was felony and may be tried before juſtices of *oyer* and *terminer* or gaol-delivery, as well as of the peace.

But ſurely the preſs-maſters or conſtables, that uſually take up men for ſervice, are not captains within the act, neither is the running from them felony within theſe ſtatutes (*z*).

4 There

(*y*) The reſolution here did not diſtinguiſh between a firſt and ſecond conductor, but between a conductor, who by agreement with the captain had the leading them quite thro to the place of rendezvous, and one who was hired to carry them part of the way, and then deliver them to another conductor; a conductor of this laſt ſort, whether firſt or ſecond, it was agreed was not a captain within the ſtatute. See *Hut.* 134.

(*z*) Theſe ſeveral acts of parliament enacted for the puniſhment of ſoldiers running away from their captains are now in a manner uſeleſs by reaſon of the frequent ſtatutes for puniſhing mutiny and deſertion by the martial law, a method more conciſe and effectual, which

There are no other felonies newly enacted in the time of queen *Mary*, but thoſe that were temporary, as 1 & 2 P. & M. *cap.* 3. telling falſe news, *&c.* after a former conviction (*) and 1 *Mar. cap.* 12. concerning riots.

CHAP. LXIV.

Concerning felonies newly enacted *in the times of Queen* Elizabeth, *King* James, *King* Charles I. *and King* Charles II.

IN the time of Q. *Elizabeth* there were ſeveral acts for making new felonies, and they be ranked into theſe ranks.

I. Such as were only temporary or during the queen's life; ſuch were the ſtatutes of 1 *Eliz. cap.* 16. which in ſome caſes made rebellious aſſemblies felony. 14 *Eliz. cap.* 1. touching withholding the queen's caſtles and other matters. 23 *Eliz. cap.* 2. touching ſeditious books, letters, prophecies, calculation of the queen's nativity, *&c.*

II. Such as were perpetual, or otherwiſe continued, but afterwards repeald, as 1 *Eliz. cap.* 10. and 14 *Eliz. cap.* 4. touching exportation of leather, repeald by the ſtatute of 18 *Eliz. cap* 9: 5 *Eliz. cap.* 16. concerning witchcraft, repeald by 1 *Jac.* 1: *cap.* 12.

which, however neceſſary it may be in the time of war, is by many thought not ſo ſuitable to *Engliſh* freedom in times of peace and tranquillity. See the ſtatutes 1 *W. & M. Seſſ.* 1. *cap.* 5. and 6 *Geo.* 2. *cap.* 3. between which years they have been often renewd, it not having been judged proper to make them of long continuance, but rather to renew them from year to year.

(*) This offenſe was not made felony, but was puniſhable by impriſonment for life, and forfeiture of goods and chattels.

III. Such as were perpetual and ſtand unrepealed, or were temporary at firſt, and made perpetual, and of theſe I ſhall here give a brief account.

By the ſtatute of 5 *Eliz. cap.* 14. It is enacted, "That "if any perſon or perſons upon his or their own head or "imagination, or by falſe conſpiracy or fraud with others "ſhall wittingly, ſubtilly and falſly forge or make, or ſubtilly "cauſe, or wittingly aſſent to be forged or made any falſe "deed, charter, or writing ſealed, court-roll, or the will of "any perſon in writing, to the intent, that the ſtate of free-"hold or inheritance of any perſon or perſons of in or to "any lands, tenements or hereditaments freehold or copyhold, "or the right, title, or intereſt of any perſon or perſons in "or to the ſame or any of them ſhall or may be moleſted, "troubled, defeated, recoverd or charged, or ſhall pronounce, "publiſh, or ſhew forth in evidence any ſuch falſe or forged "deed, charter, writing, court-roll or will as true, know-"ing the ſame to be falſe and forged, as is aforeſaid, to the "intent above rememberd, and ſhall thereof be convicted "either by action or actions of *forger of falſe deeds* to be "founded upon this ſtatute, or otherwiſe according to the "order and courſe of the common law, *&c.* ſhall pay the "party grieved his double coſts and damages, be ſet upon "the pillory, both his ears cut off, and alſo his noſtrils ſlit "and ſeard with an hot iron, be impriſond during life, and "forfeit the profits of his lands during life (*a*).

"Or if any perſon, as before, ſhall forge or aſſent to be "forged, *&c.* any charter, deed, or writing, to the intent, "that any perſon may have a term of years in any lands, "not copyhold, or any annuity for life, years, or in tail, or "fee-ſimple, or ſhall forge any obligation, bill obligatory, "acquittance, releaſe, or diſcharge of any debt, account, ſuit, "demand, or other thing perſonal, or ſhall pronounce, *&c.* "*ut ſupra*, that then he ſhall pay the party grieved double "coſts and damages, be ſet upon the pillory, and loſe one of "his ears, *&c.*

"And

(*a*) Upon this clauſe of the ſtatute *Japhet Croke*, alias Sir *Peter Stranger*, was convicted, *Paſc.* 4 *Geo.* 2. *B. R.* and ſuffer'd the penalties of the act.

" And if any perſon or perſons, being hereafter convict " of any of the offenſes aforeſaid by any of the ways above " limited, ſhall after his or their conviction or condemna- " tion eftſoons commit or perpetrate any of the offenſes afore- " ſaid, that then every ſuch ſecond offenſe ſhall be adjudged " felony; and the parties convicted or attaint thereof accord- " ing to law ſhall ſuffer death, and forfeit their goods and " lands, as in caſe of felony, without having advantage of " ſanctuary or clergy; but the wife not to loſe her dower, " nor blood to be corrupted, nor heirs diſherited.

" Juſtices of *oyer* and *terminer* and of aſſize to hear and de- " termine the offenſes againſt this act.

" Not to extend to any attorney or lawyer pleading a " forged deed, not being party or privy to the forging, nor " to the exemplification of a forged deed, nor to any judge, " that ſhall cauſe the ſeal to be ſet to ſuch exemplifica- " tion.

Upon this ſtatute, ſo far as it relates to felony, theſe things conſiderable ſhall be ſet down in order.

1. What is a making, forging, or aſſenting.

If *A.* make a deed of feofment to *B.* and after make a deed of feofment to *C.* with an ante-date before the other feofment, this was a forging within the ſtatute of 1 *H.* 5. *cap.* 3. and alſo within this ſtatute. *Co. P. C. cap.* 75. 27 *H.* 6. 3. *a.*

But *note*, that it is not the bare ante-dating of a deed, that makes a forgery, for then moſt aſſurances, eſpecially bargains and ſales for recoveries, leaſes for years to enable a releaſe would be forgeries; but that, which makes it forgery in the former caſe, is the intent to avoid his own feofment; and the words of this ſtatute are, *to the intent that the eſtate of another perſon ſhould be diſturbed*; ſo the intent is to be joind in caſe of forgery.

Again, if *A.* make a true deed of feofment to *B.* of the manor of *Dale*, and after *B.* raſe out *D* and put in *S*, whereby the feofment imports the manor of *Sale*; or if *A.* grant a rent-charge to *B.* for life, and after ſealing and delivery *B.* raſe the deed, and enlarge the ſum or eſtate, this is a ſubtle making

making of a falſe deed within this ſtatute; *vide* 1 *Anderſ. Rep. Puckering*'s caſe, *Caſe* 151. *p.* 100.

An aſſent after the fact committed makes not the party aſſenting guilty or principal in the forging, but it muſt be a precedent or concomitant aſſent.

2. What is a writing ſealed, deed, will, or court-roll.

The forging of a falſe cuſtomary of a manor put under ſeal, whereby the intereſt of the lord is moleſted, is a writing under ſeal within this ſtatute. *Dy.* 322. *b. Taverner*'s caſe.

The inſerting of a clauſe in a will purporting a deviſe of lands without warrant or direction of the deviſor is the forging of a will within this ſtatute, tho the whole will be not forged, and altho done in the teſtator's life by the clerk, that writes the will. *Co. P. C. cap.* 75. againſt the report of *Dy.* 288. *a. Marvin*'s caſe.

But *note*, this was when the teſtator was ſpeechleſs, but if he had his underſtanding, and aſſented to it or publiſhed it afterwards, it is no forgery, tho at firſt written without his direction.

Forging ſurrenders, admittances, court-rolls of copyhold lands are within this ſtatute.

If the deed or will forged purport only a leaſe for years, whereby the freehold is charged, or of a rent-charge for years, it is within this firſt branch.

A. makes a leaſe for years to *B.* a forging of an aſſignment of that leaſe from *B.* to *C.* is a forging of a deed within the ſecond clauſe, *Co. P. C. ubi ſupra*, againſt the opinion in *Noy*'s *Rep.* in *Markam*'s caſe (*b*).

But an aſſignment made here of a term for years of land in *Ireland* is ſaid not to be within this ſtatute, but puniſhable as a miſdemeanor at common law. 29 *Eliz. Newman*'s caſe, *Hughes* 3 Part, N. 221.

3. What is a pronouncing or publiſhing, knowing the ſame to be forged.

If

(*b*) *Noy*, *p.* 42.

If *A.* forge a deed, and *B.* tell *C.* that the deed is forged, and yet *C.* publiſheth it, it was reſolved to be within the ſtatute in *Greſham's* caſe. *P.* 38 *Eliz. Cam. Stellatâ* (*c*).

But it ſeems to me, tho ſuch a relation may be an evidence of fact to prove his knowledge, yet it is not concluſive, tho perchance *de facto* the deed be forged; for poſſibly there might be circumſtances of fact, that might make the perſon relating it or his relation not credible, ſo that the *knowing* muſt upon the whole matter be left to the jury upon the circumſtances of the caſe, and therefore the caſe of *Greſham* being in the ſtar-chamber, where the lords are judges of the fact upon the evidence, is no authority in this caſe.

4. What is a writing, bill, bond, acquittance.

A will in writing concerning goods only is within this clauſe (*d*).

The forging of a ſtatute ſtaple, or recognizance in nature of a ſtatute ſtaple, is within this ſtatute, becauſe the party's hand and ſeal are to it, but not the forgery of a ſtatute merchant or recognizance, becauſe they have not the conuſor's ſeal. *Co. P. C. p.* 171. 15 *H.* 7. 16. *a.* (*e*).

A. writes and ſeals a letter to *B.* and ſubſcribes it, *B.* cuts off the lower part of the letter with the hand of *A.* and puts to it the ſeal of his letter, and over it writes an acquittance, this is the forging an acquittance. *Co. P. C. ubi ſupra.*

I come to the point of felony, having before ſtated what is a firſt offenſe within this ſtatute.

There muſt be a conviction of a firſt offenſe before the ſecond offenſe be committed, otherwiſe the ſecond offenſe is not felony; and therefore if before conviction of forgery *A.*

(*c*) This is the ſame with *Markham's* caſe, and is cited by lord *Coke* for this purpoſe. *Co. P. C. p.* 170. *in margine.*

(*d*) This ſeems to be grounded on a miſtake of lord *Coke*, who in his comment on this ſtatute ſuppoſes the word *writing* to be inſerted in the latter part of this clauſe, after the words *any obligation or bill obligatory*, whereas it is not ſo, for the ſtatute makes no mention of *writings* but only with reſpect to an intereſt in lands or annuities, and conſequently does not extend to a will of goods only, and ſo was the caſe cited by lord *Coke* in *Dyer* 301. *b.* which was of a will of a leaſe for years, and not of perſonal goods only; but this caſe is expreſly included in a later ſtatute, viz. 2 *Geo.* 2. *cap.* 25. which makes ſuch a forgery felony without benefit of clergy.

(*e*) According to this caſe it ſhould be quite the reverſe, for it is there ſaid, that the ſtatute *merchant* has the ſeal of the party, which, the book ſays, is not requiſite in a ſtatute *ſtaple.*

commit a firſt and a ſecond offenſe, this ſecond offenſe is not felony within this ſtatute.

And by conviction, I conceive, is intended not barely a conviction by verdict, where no judgment is given, but it muſt be a conviction by judgment.

And the indictment for a ſecond offenſe muſt recite the record of the firſt conviction, that it may appear to be a conviction of ſuch a forgery as is within the ſtatute; for if it be not, the indictment of felony for the ſecond offenſe fails.

And upon the evidence, tho the record of the firſt conviction ought to be proved, yet the matter of the firſt conviction ſhall never be re-examind, but muſt ſtand for granted, and the party is concluded touching the truth of the matter of the firſt conviction by the record of that conviction.

If *A.* publiſh a falſe deed knowingly, and be convict upon this ſtatute for this offenſe, and after ſuch conviction forge a deed, this is a ſecond offenſe, and felony within this ſtatute, tho the publiſhing be prohibited by one clauſe, and the forging by another, adjudged P. 7 *Jac. B. R. Booth*'s caſe (*f*), *Co. P. C. p.* 172. for the words are, *if he commit* any *of the ſaid offenſes the ſecond time*: And ſo, if he be convict of forgery, the publication of a forged deed afterwards knowingly is felony, or if he be firſt convict of the forgery of a court-roll, and after that forge an obligation or acquittance; for the ſecond offenſe in any of the forgeries or publications is felony, tho it be of a different kind, if the firſt or ſecond offenſe be within the ſtatute (*g*).

The hearing and determining of the offenſe againſt this ſtatute are limited to the juſtices of aſſize, or *oyer* and *terminer*.

This extends not to the juſtices of peace, for tho in the commiſſion of the peace there is a clauſe, *nec non ad audiendum*

2

(*f*) 13 *Co. Rep.* 34.

(*g*) But by 2 *Geo.* 2. *cap.* 25. the firſt offenſe is made felony without benefit of clergy, and extends to all deeds, wills, bonds, writings obligatory, bills of exchange, promiſory notes, indorſements or aſſignments of bills of exchange or promiſory notes, or acquittances or receipts for money or goods, if done with an intention to defraud any perſon; this act was made to continue for five years, and to the end of the next ſeſſions of parliament, and ſo expired the 15th of *May* 1735.

dum & terminandum, yet they being commiſſions of a ſeveral nature, they are not compriſed under the name of juſtices of *oyer* and *terminer* (*b*).

But the court of king's bench may hear and determine theſe offenſes, for they are juſtices of *oyer* and *terminer* and more. *Co. P. C. cap.* 41. *p.* 103.

The offenders as to felony in this ſtatute are excluded from clergy and ſanctuary.

The ſtatute of 5 *Eliz. cap.* 20. concerning *Egyptians*. *Vide quæ ſupra ſuper ſtat.* 1 & 2 *P. & M.*

By the ſtatute of 8 *Eliz. cap.* 3. " No man ſhall bring, " deliver, ſend, receive, or take, or procure to be brought, " deliverd, ſent, received, or taken into any ſhip or bottom " any manner of ſheep alive, to be carried or conveyd out " of this realm, or out of *Wales*, or out of *Ireland* or any of " the queen's dominions upon pain of forfeiture of all his " goods, the moiety to the queen, the other moiety to the " informer, impriſonment, and loſs of his left hand; and " the ſecond offenſe to be felony.

" But no corruption of blood or loſs of dower.

Juſtices of *oyer* and *terminer*, gaol-delivery or of the peace, have power to hear and determine offenſes.

The offender hath benefit of clergy as well in caſe of felony, as of cutting of the hand. *Co. P. C. cap.* 42.

The ſtatute of 14 *Eliz. cap.* 5. concerning rogues and vagabonds is repeald by the ſtatute of 35 *Eliz. cap.* 7. and ſettled in another way by 39 *Eliz. cap.* 4. and therefore I ſhall refer it thither.

By the ſtatute of 27 *Eliz. cap.* 2. " It ſhall not be lawful " for any jeſuit, ſeminary prieſt, or other ſuch prieſt, dea- " con, or other religious or eccleſiaſtical perſon whatſoever, " born within this realm or any of the queen's dominions, " hereafter to be made, ordaind or profeſſed by any autho- " rity or juriſdiction, derived, challenged, or pretended from " the ſee of *Rome*, to come into this realm or any of the " queen's dominions, (except as in that act is excepted,) un- " der pain of high treaſon.

" And

(*b*) *Cro. Eliz.* 87.

" And any perſon, that after the end of forty days ſhall " wittingly and willingly relieve, comfort, aid, or maintain " ſuch jeſuit, *&c.* being at liberty and out of hold, knowing " him to be a jeſuit, ſeminary prieſt, *&c.* ſhall be adjudged " a felon without benefit of clergy.

By the ſtatute of 31 *Eliz. cap.* 4. " If any having the " charge or cuſtody of any armour, ordinance, munition, pow- " der, ſhot, or of habiliments of war of the queen, her heirs " or ſucceſſors, or of any victuals provided for the victual- " ling of any ſoldiers, gunners, mariners, or pioners, ſhall for " lucre, or gain, or wittingly, adviſedly, and of purpoſe to " hinder or impeach her majeſty's ſervice embezzle, purloin " or convey away the ſame to the value of twenty ſhillings " at one or ſeveral times, it ſhall be felony.

" The proſecution to be within a year after the offenſe: " No corruption of blood, loſs of dower, nor loſs of lands but " during the life of the offender.

" The priſoner allowd to make any lawful proof for his diſ- " charge. Clergy not taken away.

By the ſtatute of 35 *Eliz. cap.* 1. It is enacted, " That " if any perſon above the age of ſixteen years, who ſhall " obſtinately refuſe to repair to ſome church or chapel, or " uſual place of common prayer to hear divine ſervice eſta- " bliſhed by her majeſty's laws or ſtatutes, and ſhall forbear " to do the ſame by the ſpace of a month next after with- " out any lawful cauſe, ſhall at any time after forty days " next after the end of this ſeſſion of parliament, by print- " ing, writing, words or ſpeeches adviſedly and purpoſely " go about to perſwade others to impugn her majeſty's power " in cauſes eccleſiaſtical, or perſwade others to forbear com- " ing to church to hear divine ſervice or receive the com- " munion according to law, or to be preſent at any unlaw- " ful conventicle or meeting, under pretenſe of exerciſe of " religion contrary to her majeſty's laws, or ſhall after the forty " days willingly join in or be preſent at ſuch aſſemblies or " meetings under colour of exerciſe of religion, contrary to " the laws of this realm, then ſuch perſon being thereof law- " fully convicted ſhall be committed to priſon, there to re-

" main without bail or mainpriſe, till he ſhall conform and " yield to come to ſome church or chapel, and hear divine " ſervice according to the queen's laws, and make open ſub- " miſſion and declaration of his conformity, as by the " act is preſcribed.

" And if ſuch perſon ſhall not within three months, be- " ing required by the biſhop of the dioceſe or juſtice of peace " of the county, where he is convicted, come to ſome " pariſh church to hear divine ſervice, he ſhall abjure the " realm, as by that act is appointed.

" And if he ſhall refuſe to abjure, or having abjured ſhall " not go, or elſe ſhall return without the queen's licenſe, it is " felony without benefit of clergy.

" No loſs of dower, corruption of blood, nor forfeiture of " lands longer than the life of the offender.

" Special puniſhment by forfeiture of 10 *l. per menſem*, " for ſuch as relieve them, except father, mother, *&c.*

" Not to extend to women or popiſh recuſants.

Tho it were formerly doubted, yet upon great conſidera- tion by all the judges it hath been reſolved, that this ſta- tute is in force.

But to make up the offenſe to be felony there are ſo many circumſtances required, that it is difficult to have any legal con- viction according to this ſtatute.

1. The party muſt be above ſixteen years old. 2. He muſt obſtinately refuſe to come to church, which obſtinate refuſal cannot be without a requeſt or monition to repair to church. 3. He muſt forbear to come to church for a month after ſuch refuſal without a reaſonable cauſe of abſence. 4. He muſt do ſome of thoſe acts limited by the ſtatute, as to diſſuade coming to church, *&c.* or after that month's abſence be at an unlawful conventicle.

And all theſe things muſt be preciſely charged in the in- dictment and proved upon evidence, or otherwiſe no ſuch commitment, or abjuration, or felony can follow.

And therefore, altho many have been haſtily convicted up- on this ſtatute upon general indictments of not coming to church, and being at an unlawful conventicle, yet never was

any convict before me upon this offenſe, becauſe theſe circumſtances were either not laid in the indictment, or not effectually proved.

Beſides, it is difficult to ſay, what conventicle upon pretenſe of exerciſe of religion was in thoſe times contrary to the laws of the realm, unleſs maſs, or by maſs-prieſts, tho of late time it hath been ſettled by ſpecial acts of this parliament, *viz.* (*i*).

The reaſon why popiſh recuſants are exempted out of this act is, becauſe there is proviſion touching them in the next following, *viz.*

By the ſtatute of 35 *Eliz. cap.* 2. " If any popiſh recuſant " not having an eſtate in lands of twenty marks *per annum*, " or goods to the value of twenty marks, (other than *feme-* " *coverts*) ſhall not repair to his dwelling-houſe, *&c.* accord- " ing to the act, and preſent himſelf and his name to the " miniſter and church-wardens of that pariſh; or after their " coming ſhall go five miles from their dwelling, and being " therefore taken ſhall not within three months after their " taking come to church and make their confeſſion of con- " formity, as in that act is expreſt, being thereunto required " by a juſtice of peace, or by the miniſter or curate of the " pariſh, then ſuch recuſant being thereunto required by two " juſtices or coroner of the county ſhall abjure the realm " for ever; and if he refuſe to abjure, or having abjured re- " fuſe to go out of the realm, or being gone ſhall return " without licenſe, it ſhall be felony without clergy.

By the ſtatute of 39 *Eliz. cap.* 4. All former ſtatutes againſt rogues and vagabonds are repealed, and among other things it is enacted, " That if any rogues ſhall appear dangerous, or " will not be reformed from their roguiſh life by the proviſions " of that act, it ſhall be lawful for two juſtices of the limits " whereof one of the *Quorum*, to commit him to the houſe " of correction till the next quarter-ſeſſions, and then the " major

2

(*i*) There is a blank here in the *MS.* but the acts here meant are 1 *Car.* 1. *cap.* 4. and 22 *Car.* 2. *cap.* 1. by which ſtatutes every aſſembly for religious worſhip of five or more beſides the family, in other manner than is allowed by the liturgy of the church of *England*, is declared to be a conventicle contrary to law; but theſe acts are now of no force againſt proteſtant diſſenters by reaſon of the toleration act. 1 *W.* & *M. cap.* 18.

" major part of the juſtices may baniſh him out of the realm " and dominions thereof to ſuch place, as ſhall be aſſignd " by ſix of the privy council, whereof the lord chancellor " or treaſurer to be one, or condemn him to the gallies of " this realm; and if any ſuch rogue ſo baniſhed ſhall return " again without lawful warrant, it ſhall be felony to be " heard and determind in that county of *England* or *Wales*, " where he ſhall be apprehended.

" But in this caſe the offender hath clergy.

This act is continued by the ſtatute of 1 *Jac. cap.* 25. 3 *Car.* 1. *cap.* 4. and 16 *Car.* 1. *cap.* 4.

By the ſtatute of 1 *Jac. cap.* 7. It is farther added, " That " ſuch dangerous and incorrigible rogues ſhall by judgment " of the ſame juſtices in the ſeſſions be branded in the ſhoul- " der with the letter *R.* and be ſent to the place of his laſt " dwelling; and if it cannot be known, then to the place of " his birth; and if ſuch rogue be after found offending in beg- " ging or wandering contrary to this ſtatute, it ſhall be fe- " lony without clergy, and tried in the county, where he " ſhall be taken.

This act is likewiſe continued by 3 *Car.* 1. and 16 *Car.* 1. *cap.* 4.

This act doth not take away the puniſhment by the ſtatute of 39 *Eliz. cap.* 4. but gives election to the juſtices in the ſeſſions to inflict either.

By the ſtatute of 39 *Eliz. cap.* 17. " 1. Idle and wandering " ſoldiers or mariners, or idle perſons wandering as ſoldiers " or mariners, 2. Idle or wandering ſoldiers coming from " ſea not having a teſtimonial under the hand of a juſtice of " peace, ſetting down the time and place of his landing, place " of his dwelling and birth, and limiting a time for his paſ- " ſage thither, 3. Or exceeding the time limited by his " teſtimonial fourteen days, unleſs he fall ſick, if he be in " truth a ſoldier or mariner, 4. Every wandering ſoldier or " mariner, or every perſon wandering as a ſoldier or ma- " riner counterfeiting his teſtimonial, or having the ſame " forged teſtimonial about him, knowing the ſame to be forged, " is a felon without benefit of clergy.

This

This offenſe may be heard and determind before juſtices of aſſize, gaol-delivery, or of the peace, having power to hear and determine felony. No corruption of blood.

If a freeholder will take him into ſervice for a year, and he become bound by recognizance, *ut per ſtatute*, no farther proceeding to be againſt him, but if within the year he depart without licenſe, it is felony without beneſit of clergy.

Continued by 3 *Car.* 1. *cap.* 4. and 16 *Car.* 1. *cap.* 4.

And thus far for felonies enacted in the time of queen *Elizabeth.*

In the time of king *James* theſe enſuing felonies were *de novo* enacted.

By the ſtatute of 1 *Jac.* *cap.* 11. "If any perſon within "his majeſty's dominions of *England* and *Wales*, being married, "do at any time after marry any perſon or perſons, the "former husband or wife being alive, every ſuch offenſe "ſhall be felony, and the party offending ſhall receive ſuch "proceeding, trial and execution in ſuch county, where he "or ſhe is taken.

This act hath five exceptions. 1. It ſhall not extend to ſuch perſons, whoſe huſband or wife ſhall be continually remaining beyond the ſeas for the ſpace of ſeven years together. 2. Or whoſe huſband or wife ſhall abſent him or herſelf in any place within the king's dominions, the one not knowing the other to be living within that time. 3. Nor to any perſon divorced by any ſentence had or to be had in the eccleſiaſtical court. 4. Nor to any perſon whoſe marriage hath been or ſhall be declared void by ſentence in the eccleſiaſtical court. 5. Nor to any perſon or perſons for or by reaſon of any marriage had or to be had within the age of conſent.

This felony not to make corruption of blood, or loſs of dower, or diſheriſon of the heir.

1. Obſervables upon the body of the act.

Altho the ſecond marriage be ſimply void, yet the parliament thought it juſt to make it felony.

A. takes *B.* to huſband in *England*, and after takes *C.* to huſband in *Ireland*, ſhe is not indictable in *England*, becauſe the offenſe was committed out of this kingdom. But if *A.*

marry a husband in *Ireland*, and come into *England* and marry a ſecond huſband here, it is felony. The former caſe was accordingly ruled at *Newgate* ſeſſions (*k*).

A. takes *B.* to huſband in *Holland*, and then in *Holland* takes *C.* to huſband, living *B.* and then *B.* dies, and living *C.* ſhe marries *D.* this is not marrying a ſecond huſband the former being alive, for the marriage to *C.* living *B.* was ſimply void, and ſo he was not her huſband, but if *B.* had been living, this had been felony to marry *D.* in *England*: Ruled at *Newgate* ſeſſions about 1648. the lady *Madiſon*'s caſe.

The firſt and true wife is not to be allowd as a witneſs againſt the huſband, but I think it clear the ſecond wife may be admitted to prove the ſecond marriage, for ſhe is not his wife, contrary to a ſudden opinion deliverd in *July* 1664. at the aſſizes in *Surrey* in *Arthur Armſtrong*'s caſe; for ſhe is not ſo much as his wife *de facto*. *Vide quæ dixi ſupra ſuper ſtatut.* 3 *H.* 7. *cap.* 2. *p.* 661.

2. Obſervables touching the exceptions.

As to the *firſt*, if the huſband or wife be beyond the ſeas ſeven years, tho the party in *England* hath notice, that he or ſhe is living, yet it is no felony, which appears by the ſecond exception, where the party is commorant in the king's dominions, if the party hath notice, it is felony; notice there makes the offenſe, but not when the huſband or wife is beyond ſea; and yet in the former caſe as well as the latter the ſecond marriage is void. *Vide* 22 *E.* 4. *Conſultation* 5.

As to the *ſecond* exception: ſuppoſe the firſt wife or huſband be abſent in *New-England* or *Ireland* ſeven years, this is beyond the ſeas, and ſo within the words of the firſt exception, and yet within the king's dominions, and ſo not aided by the words of the ſecond exception, unleſs without notice; it ſeems *in favorem vitæ* the words *within the king's dominions* muſt be intended within *England*, *Wales* or *Scotland* to make both clauſes conſiſtent; but however the iſle of *Wight* is not beyond the ſea within the firſt clauſe, becauſe *infra corpus comitatûs Southampton*: ſo for *Scilly*, *Lundy*. *Quære* of *Guernſey*, *Jerſey*.

(*k*) 1 *Sid.* 171. *Kel.* 79.

As to the *third* exception: certainly the divorce intended is not *à vinculo matrimonii*, for then without the aid of any proviſo either may freely marry; but it muſt be intended of divorces *à mensâ & thoro*. *P.* 12 *Car.* 1. *B. R. Porter's* caſe, it was doubted, whether a divorce *causâ ſævitiæ* were ſuch a divorce as was within this exception, becauſe it ſeemed rather to be a proviſional ſeparation for the wife's ſafety and maintenance, than a divorce; but it was never reſolved, *Cro. Car.* 461. (*l*).

If there be a divorce *à vinculo*, and one of the parties appeals, tho this ſuſpend the ſentence and poſſibly may repeal it, yet a marriage pending that appeal is held to be aided by this exception. *Co. P. C. cap.* 27. *p.* 89. But if the ſentence of divorce be repeald, a marriage after is not aided by this exception, tho there was once a divorce.

As to the *fifth* exception; If either party be within the age of conſent, the exception extends to both: *A.* of the age of twenty years marries *B.* of the age of nine years, *A.* marries a ſecond wife, this is aided by the exception, as well as if *B.* had married a ſecond huſband before agreement at her age of conſent to the firſt marriage, for either of them may *reſilire* before they have both conſented. *T.* 42 *Eliz. B. R. Babington's* caſe, *Co. P. C. cap.* 27. *p.* 89.

But if a woman of twelve years marry a man of fourteen years, a ſecond marriage by either is felony, tho they are infants, becauſe as to matters of this kind, eſpecially the buſineſs of marriage, they are at this age adjudged of diſcretion. *Sed vide ſupra cap.* 3. *plenius de hâc materiâ.*

3. Obſervables touching the trial.

The trial to be in the county, where the offender is apprehended, is added *cumulativè*; for he may be indicted, where the ſecond marriage was, tho he be never apprehended, and ſo may proceed to outlawry, as likewiſe it may be done upon the ſtatute of 7 *H.* 7. *cap.* 1. of ſoldiers. *Co. P. C. cap.* 26. *p.* 87.

By the ſtatute of 1 *Jac. cap.* 12. All former acts againſt conjuration, inchantments, *&c.* are repeald, and it is enacted,

3 "1. That

(*l*) *Kel.* 27.

" 1. That if any perſon ſhall uſe, practiſe, or exerciſe any " invocation or conjuration of any evil or wicked ſpirit,

" 2. Or ſhall conſult, covenant with, entertain, employ, " feed, or reward any wicked or evil ſpirit to or for any in- " tent or purpoſe,

" 3. Or take up any dead man, woman, or child out of " his or their grave, or any other place, or the ſkin, bone, " or any other part of any dead perſon to be employ'd in " any manner of witchcraft, ſorcery, charm, or inchant- " ment,

" 4. Or ſhall uſe, practiſe, or exerciſe any witchcraft, " ſorcery, charm, or inchantment, whereby any perſon ſhall " be kild, deſtroyd, waſted, conſumed, pined, or lamed in his " or her body or any part thereof,

" Every ſuch perſon or perſons, their aiders, abettors and " counſellors being thereof convict and attaint ſhall ſuffer " death as a felon without clergy.

" 1. If any perſon ſhall take upon him by witchcraft, in- " chantment, charm, or ſorcery to tell, where any treaſure " of gold or ſilver may be found in the earth or other ſecret " places.

" 2. Or where goods or things loſt or ſtolen ſhould be " found or be come at.

" 3. Or ſhall uſe any ſorcery to the intent to provoke " any perſon to unlawful love.

" 4. Or whereby any cattle or goods of any perſon ſhall " be deſtroyd, waſted, or impaird.

" 5. Or to hurt or deſtroy any perſon in his or her body, " tho the ſame be not effected or done.

" Firſt conviction one year's impriſonment without bail, " and once a quarter to ſtand two hours in the pillory, and " confeſs his or her fault.

" If after conviction he commit the like offenſe, and be " convicted and attaint of ſuch ſecond offenſe, he ſhall ſuffer " death as a felon without clergy; but no loſs of dower, " corruption of blood, nor heir diſherited.

By the ſtatute of 1 *Jac. cap.* 31. perſons going abroad with a plague-ſore, felony. But this act is diſcontinued, as my lord

Coke

Coke ſaith, *Co. P. C. p.* 90. but 3 *Car.* 1. *cap.* 4. hath revived or continued it to the end of the firſt ſeſſion of the next parliament; and by 16 *Car.* 1. *cap.* 4. it is continued till repeald.

But it gives no forfeiture of lands, goods, or chattels.

By the ſtatute of 3 *Jac. cap.* 4. "If any ſubject paſs out "of this realm to the intent to ſerve any forein prince, "ſtate, or potentate, or ſhall paſs over the ſeas, and there "ſhall voluntarily ſerve any ſuch forein prince, *&c.* not ha-"ving before his or their paſſing taken the oath preſcribed in "that act before the cuſtomer, comptroller of the port, ha-"ven or creek, or their deputy or deputies, or being a gen-"tleman, or of higher rank, or hath born office of a captain, "lieutenant, or other place in the camp ſhall paſs, *&c.* before "he hath taken the oath and given bond, *&c.* it is felony.

"The trial ſhall be in the county, where the offenſe is "committed, *viz.* the place of his departure, tho that be but "part of the offenſe, and there they ſhall enquire of the "reſt of the offenſe committed beyond ſea, *viz.* his ſervice "there (*m*).

"The offender hath his clergy.

"No corruption of blood nor loſs of dower.

By the ſtatute of 21 *Jac. cap.* 26. "All perſons, who ac-"knowledge or procure to be acknowledged any fine or "fines, recovery or recoveries, deed or deeds enrolled, ſta-"tutes or recognizances, bail or judgment in the name of any "perſon or perſons not privy or conſenting to the ſame, and "being thereof lawfully convicted or attaint ſhall incur the "penalties of felons without benefit of clergy.

"No corruption of blood nor loſs of dower.

A bail taken before a judge is not a bail within this ſtatute till it be filed of record, and if it be not filed, the acknowledging thereof in another's name makes not felony, but a miſdemeanor only. (*)

The ſtatute of 21 *Jac. cap.* 27. for murdering baſtard children: This I ſhall reſerve to the title of evidence, *Part* II. *cap.* 39. *quod vide ibidem.*

(*m*) *Co. P. C. p.* 80. (*) But this is ſince made felony by 4 & 5 *W. & M. cap.* 4.

And thus far of felonies in the time of king *James*.

In the time of king *Charles* I. I find not any new enacted felony.

I therefore come to the time of king *Charles* II. (*)

(*) Here the manuſcript breaks off, our author having proceeded no farther, but to render the work more complete, it is thought proper to ſubjoin an account of the ſeveral felonies, which have been enacted ſince that time, by which it will appear, that later times have been no leſs fruitful in multiplying capital puniſhments, than former ones were.

Felonies enacted in the time of king Charles II.

I. Tranſporting wool.

BY 13 & 14 *Car.* 2. *cap.* 18. it is made felony to tranſport wool out of *England*, *Wales* or *Ireland*; but by 7 & 8 *W.* 3. *cap.* 28. the making it felony is repeald, and it is reduced to a miſdemeanor, which by that and later ſtatutes is ſubjected to ſevere penalties.

II. *Coventry*'s act concerning diſmembring or diſfiguring.

By 22 & 23 *Car.* 2. *cap.* 1. If any ſhall of malice forethought, and by lying in wait unlawfully cut out or diſable the tongue,

Put out an eye,

Slit the noſe,

Cut off a noſe or lip,

Or cut off or diſable any limb or member of any other perſon with intention to maim or diſfigure, they, their counſellers, aiders, and abetters ſhall be guilty of felony without benefit of clergy.

Attainder on this ſtatute ſhall not work any corruption of blood or forfeiture.

Sir *John Coventry* a member of the houſe of commons had a little before been aſſaulted in the ſtreet, and his noſe ſlit, which gave occaſion to the making this act, which from him was called *Coventry*'s act.

Upon this ſtatute *Coke* and *Woodburne* were condemned and executed at *Suffolk* aſſizes 8 *Geo.* 1. for ſlitting the noſe of Mr. *Criſpe*. See *State Tr. Vol.* VI. *p.* 212.

III. Maliciouſly burning ſtacks of corn, or killing cattle in the night.

By 22 & 23 *Car.* 2. *cap.* 7. Whoever ſhall in the night-time maliciouſly, unlawfully, and willingly burn any ſtacks of corn, hay, or grain, barns or other houſes, or buildings, or kilns,

Or ſhall in the night-time maliciouſly, unlawfully, and willingly kill or deſtroy horſes, ſheep, or other cattle, ſhall be guilty of felony; but liberty is given the offender to chuſe tranſportation for ſeven years.

Attainder on this act ſhall not work corruption of blood, loſs of dower, or diſheriſon of the heir.

During the ſhort reign of king James II. *I do not find any new enacted felony.*

Felonies enacted in the time of king William III.

I. Perſonating bail.

BY 4 *W.* & *M.* *cap.* 4. Perſonating another before thoſe, who have authority by that act to take bail, ſo as to make him liable to the payment of any ſum of money in that ſuit or action, is made felony.

II. Counterfeiting lottery tickets.

By 5 & 6 *W. & M. cap.* 7. 8 *Ann. cap.* 4. 12 *Ann. ſeſſ.* 1. *cap.* 2. *ſeſſ.* 2. *cap.* 9. 5 *Geo.* 1. *cap.* 3 & 9. 7 *Geo.* 1. *cap.* 20. The forging or counterfeiting the tickets in the ſeveral lotteries appointed by the ſaid acts,

Or ſtanding orders or receipts given out in purſuance of the ſaid acts,

Or altering the number or principal ſum thereof,

Or counterfeiting the hand of any perſon to ſuch order,

Or the bringing any ſuch forged ticket, *&c.* (knowing it to be ſo) to the managers, *&c.* with intent to defraud his majeſty or any contributor, is made felony without benefit of clergy.

III. Counterfeiting the ſtamps.

By 5 & 6 *W. & M. cap.* 21. 9 & 10 *W. cap.* 25. 8 *Ann. cap.* 9. 9 *Ann. cap.* 11 & *cap.* 23. 10 *Ann. cap.* 19. 12 *Ann. ſeſſ.* 2. *cap.* 9. 5 *Geo.* 1. *cap.* 2. Forging any of the ſtamps appointed by the ſaid acts,

Or counterfeiting or reſembling the impreſſion of the ſame upon any vellum, parchment, or paper,

Or uttering, vending, or ſelling any vellum, *&c.* with ſuch counterfeit impreſſion, knowing the ſame to be ſo,

Or uſing any ſtamps or marks with intent to defraud the crown of the ſtamp-duty, is made felony without benefit of clergy.

IV. Counterfeiting the ſeal of the Bank, bank-notes, *&c.*

By 7 & 8 *W. cap.* 31. §. 36. 8 & 9 *W. cap.* 19. §. 36. and 11 *Geo.* 1. *cap.* 9. The forging the common ſeal of the bank,

Or any bank-bill or bank-note,

Or eraſing or altering any ſuch bill or note,

Or altering or eraſing any indorſement on any bank-bill or note,

Or tendering the ſame in payment, knowing the ſame to be forged, eraſed, or altered, is made felony.

V. Counterfeiting exchequer-bills.

By 7 & 8 *W. cap.* 31. §. 78. 9 *W. cap.* 2. §. 3. 5 *Ann. cap.* 13. 7 *Ann. cap.* 7. 9 *Ann. cap.* 7. 11 *Geo.* 1. *cap.* 17. §. 12. The counterfeiting exchequer-bills,

Or any indorſement thereon,

Or tendering ſuch counterfeit bills or indorſement, knowing the ſame to be counterfeit, with intention to defraud his majeſty or any other perſon, is felony without benefit of clergy.

VI. Blanching copper, *&c.*

By 8 & 9 *W. cap.* 25. Blanching copper for ſale, or mixing blanched copper with ſilver,

Or knowingly buying or ſelling, or offering to ſale ſuch, or any other malleable mixture of metals or minerals heavier than ſilver, and wearing like gold,

Or receiving, paying, or putting off any counterfeit, or unlawfully diminiſhed milled money (not cut in pieces) at a lower rate than it imports, or was coined or counterfeited for, is made felony.

Felonies enacted in the time of queen Anne.

I. Wilfully deſtroying any ſhip.

By 1 *Ann. ſeſſ.* 2. *cap.* 9. and 4 *Geo.* 1. *cap.* 12. it is felony for any captain, maſter, mariner, or other officer belonging to any ſhip wilfully to caſt away, burn, or deſtroy the ſaid ſhip, or procure the ſame to be done to the prejudice of the owner,

Or for the owner, captain, *&c.* to do the like, to the prejudice of any underwriter of the policy of inſurance, or of any merchant, who ſhall load goods therein.

II. Receiving ſtolen goods.

By 5 *Ann. cap.* 31. Receivers of ſtolen goods, knowing them to be ſtolen, are declared guilty of felony, as acceſſaries.

III. Aſſaulting a privy counſellor in the execution of his office.

By 9 *Ann. cap.* 16. It is felony without benefit of clergy to aſſault, wound, or attempt to kill a privy counſellor in the execution of his office.

The occaſion of making this act ſee *ſupra p.* 230. *in notis.*

IV. Counterfeiting the ſeal of the *South-Sea* company, *South-Sea* bonds, *&c.*

By 9 *Ann. cap.* 21. It is felony without benefit of clergy to forge or counterfeit the common ſeal of the *South-Sea* company,

Or to forge, counterfeit, or alter any of their bonds,

Or knowingly to tender, or offer to diſpoſe of the ſame, with intent to defraud any perſon, ſee 6 *Geo.* 1. *cap.* 11.

V. Making an hole in a ſhip, or ſtealing any pump from a ſhip.

By 12 *Ann. cap.* 18. made perpetual by 4 *Geo.* 1. *cap.* 12. The making any hole in a ſhip in diſtreſs,

Or ſtealing any pump belonging to ſuch ſhip, or aiding or abetting thereto,

Or wilfully doing any thing tending to the immediate loſs of ſuch ſhip, is made felony without benefit of clergy.

Felonies enacted in the time of king George I.

I. Concerning riotous aſſemblies.

BY 1 *Geo.* 1. *cap.* 5. (which is for the moſt part copied from an expired act of 1 *Mar. cap.* 12.) if twelve perſons or more, being unlawfully and riotouſly aſſembled, ſhall ſo continue together to the number of twelve for the ſpace of one hour after proclamation made to depart, ſuch continuance is made felony without benefit of clergy;

As alſo to oppoſe or hinder the reading the proclamation,

Or to continue to the number of twelve for one hour after ſuch hindrance ſo made, having knowledge thereof.

By the ſame act it is felony without benefit of clergy for any perſons, unlawfully and riotouſly aſſembled, with force to pull down, or begin to pull down any church, or chapel, or building for religious worſhip allowd by the toleration act, or any dwelling-houſe, barn, ſtable, or other out-houſe.

II. Maliciouſly burning any wood or coppice.

By 1 *Geo.* 1. *cap.* 48. and 6 *Geo.* 1. *cap.* 16. It is felony for any perſon maliciouſly to ſet on fire or burn any wood, underwood, or coppice, or any part thereof.

III. Returning from tranſportation, taking a reward for helping to ſtolen goods, *&c.*

By 4 *Geo.* 1. *cap.* 11. If any offender orderd for tranſportation beyond ſea ſhall return to, or (by 6 *Geo.* 1. *cap.* 23.) be found at large in *Great Britain* or *Ireland*, without ſome lawful cauſe before the expiration of his term, without licence from his majeſty, he ſhall be guilty of felony without benefit of clergy.

By the ſame ſtatute, whoever ſhall take any money or reward under pretenſe of helping any perſon to ſtolen goods, unleſs he apprehend the felon, and give evidence againſt him at his trial, ſhall be guilty of felony, and ſhall ſuffer in the ſame manner, as if he had ſtolen them himſelf with ſuch circumſtances, as the ſame were ſtolen.

Upon this clauſe *Jonathan Wild* was executed, 10 *Geo.* 1.

IV. Counterfeiting army debentures.

By 5 *Geo.* 1. *cap.* 14. 6 *Geo.* 1. *cap.* 17. 9 *Geo.* 1. *cap.* 5. It is felony without benefit of clergy for any perſon to alter or counterfeit any army debentures,

Or fraudulently to iſſue out any other than for the ſums certified by the commiſſioners.

V.

V. Counterfeiting *South-Sea* receipts or warrants, &c.

By *6 Geo.* 1. *cap.* 11. It is made felony without benefit of clergy for any one to alter, forge, or counterfeit any *South-Sea* receipt for a ſubſcription to the ſtock,

Or warrant for a dividend,

Or any indorſement or writing thereon,

Or knowingly to tender or offer to diſpoſe of the ſame with intent to defraud any one.

VI. Counterfeiting the ſeal of the two aſſurance companies.

By *6 Geo.* 1. *cap.* 18. The counterfeiting the corporation ſeal of either of the aſſurance companies, now known by the names of the *Royal Exchange* and the *London Aſſurance*,

Or altering any policy, bill, bond, or other obligation under their common ſeal,

Or knowingly paying away ſuch policy, &c. or demanding the money thereon, is felony without benefit of clergy.

VII. Maliciouſly ſpoiling the garments of any perſons in the ſtreets.

By *6 Geo.* 1. *cap.* 23. The wilful and malicious tearing, ſpoiling, cutting, burning, or defacing the garments or clothes of any perſon in the ſtreets or highways is felony.

VIII. Smugling.

By *8 Geo.* 1. *cap.* 18. If any perſons above the number of five carrying offenſive arms, or being in diſguiſe, ſhall be found paſſing with forein goods from any ſhip without due entry and payment of the duties,

Or ſhall forcibly reſiſt any officer of the cuſtoms or exciſe in the ſeiſing run goods, they ſhall be guilty of felony.

IX. Counterfeiting the name of or perſonating a proprietor for transferring ſtock, or receiving dividends.

By *8 Geo.* 1. *cap.* 22. To counterfeit the name of any proprietor,

To forge or procure to be forged, or wilfully to act and aſſiſt in forging a letter of attorney, or other inſtrument to transfer any ſhare in the capital ſtock of any corporation eſtabliſhed by act of parliament,

Or to receive any annuity, or dividend attending ſuch ſhare,

Or falſly to perſonate any proprietor for the purpoſes aforeſaid, is felony without benefit of clergy.

X. The like as to annuity orders.

By *9 Geo.* 1. *cap.* 12. To do the like with relation to any annuity order, is made felony without benefit of clergy.

XI. The *Waltham-black* act againſt appearing in diſguiſe in any foreſt, &c. unlawfully hunting deer, robbing any warren, deſtroying fiſh, maiming cattle, deſtroying trees in any avenue, &c. firing houſes, ſtacks of corn, &c. maliciouſly ſhooting at any perſon, ſending threatning letters, &c.

By *9 Geo.* 1. *cap.* 22. continued by *12 Geo.* 1. *cap.* 30. and *6 Geo.* 2. *cap.* 37. till *Sept.* 1. 1736. and from thence to the end of the next ſeſſion of parliament, it is made felony without benefit of clergy for any perſon armed with offenſive weapons, and having his face blacked, or otherwiſe diſguiſed, to appear in any foreſt, chaſe, park, &c. or in any high road, open heath, common, or down,

Or unlawfully and wilfully to hunt, wound, kill, or ſteal any red or fallow deer,

Or unlawfully to rob any warren, &c.

Or to ſteal any fiſh out of any river or pond,

Or unlawfully to break down the head or mound of any fiſh-pond, whereby the fiſh ſhall be loſt or deſtroyed,

Or unlawfully and maliciouſly to kill, maim, or wound any cattle,

Or to cut down, or otherwiſe deſtroy any trees planted in any avenue, or growing in any garden, orchard or plantation for ornament, ſhelter or profit,

Or to ſet fire to any houſe, barn, or out-houſe, hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood,

Or maliciouſly to ſhoot at any perſon in any dwelling houſe or other place.

(Upon this clauſe Edward Arnold *was convicted at* Surrey *lent-aſſizes* 1723-4. *for ſhooting at lord* Onſlow,)

Or knowingly to ſend any letter without any name, or ſigned with a fictitious name, demanding money, veniſon, or other valuable thing,

Or forceably to reſcue any perſon being lawfully in cuſtody for any of the offenſes before-mentioned,

Or to procure any perſon by gift or promiſe of money, or other reward, to join in any ſuch unlawful act.

No attainder on this act ſhall work corruption of blood, loſs of dower or forfeiture.

This act was occaſioned by the devaſtations and injuries then lately committed in a violent manner by ſeveral perſons near *Waltham*, who had appeard blacked and diſguiſed in the chaſes, foreſts, *&c.* and was from thence called the *Waltham-black* act.

XII. Concerning the pretended privilege of the *Mint* in *Southwark*.

By 9 *Geo.* 1. *cap.* 28. If any perſon ſhall within the place commonly called the *Mint*, or the pretended limits thereof, wilfully obſtruct any perſon ſerving or endeavouring to ſerve or execute any writ, warrant, or legal proceſs, *&c.*

Or ſhall aſſault or abuſe any perſon for having ſo done, whereby he ſhall receive any damage or bodily hurt;

Or ſhall oppoſe any officer of juſtice, or perſon aiding ſuch officer in the execution of any writ, warrant or proceſs, *&c.* or ſhall be abetting thereto;

Or ſhall reſcue, or knowingly harbour or conceal any priſoner taken upon ſuch proceſs;

Or ſhall preſume to exerciſe any unlawful juriſdiction for ſupporting the pretended privilege within the ſaid place, ſuch offender ſhall be adjudged guilty of felony, and be tranſported for ſeven years.

And if any perſon wearing any viſard, *&c.* or having his face or body diſguiſed ſhall join or abet any riot, or oppoſe the execution of any legal proceſs, *&c.* within the limits aforeſaid, ſuch offender ſhall be adjudged guilty of felony without benefit of clergy.

And every perſon aiding or abetting, concealing or harbouring ſuch diſguiſed perſon, ſhall be adjudged guilty of felony, and be tranſported.

XIII. The like with reſpect to *Wapping*, *Stepney*, *&c.*

By 11 *Geo.* 1. *cap.* 22. The ſame proviſion is made againſt moſt of the ſaid offenſes, if committed within the hamlet of *Wapping*, *Stepney*, or any other place within the bills of mortality, whereof preſentment ſhall have been made by the grand jury at a general or quarter-ſeſſions.

XIV. Counterfeiting *Eaſt-India* bonds, or indorſements thereon, or on *South-Sea* bonds, *&c.*

12 *Geo.* 1. *cap.* 32. Whoever ſhall forge or counterfeit, or wilfully aſſiſt in forging or counterfeiting the name or hand of the accountant general, the court of chancery, the regiſter, clerk of the report-office, or any of the caſhiers of the bank of *England*, to any certificate, report, *&c.*

Or any *Eaſt-India* bond or indorſement thereon,

Or any indorſement on any *South-Sea* bond, ſhall be adjudged guilty of felony without benefit of clergy.

XV. Aſſaulting any maſter woolcomber, weaver, maliciouſly breaking tools, *&c.*

By 12 *Geo.* 1. *cap.* 34. If any perſon ſhall aſſault any maſter woolcomber, or maſter weaver, or other perſon concernd in the woollen manufacture, whereby he ſhall receive any bodily hurt for not complying with any ſuch illegal by-laws, *&c. as in the act mentiond*,

Or ſhall write or ſend any threatning letter to ſuch perſon for not complying with ſuch illegal by-laws, or with any demands or pretenſes of his workmen, or others employed by him in the woollen manufacture, he ſhall be deemed guilty of felony, and be tranſported for ſeven years.

If any perſon ſhall maliciouſly cut or deſtroy any woollen goods in the loom or on the rack;

Or ſhall deſtroy any rack on which ſuch goods are hanged in order to dry;

Or ſhall wilfully break any tools uſed in the making ſuch woollen goods not having the conſent of the owner ſo to do;

Or ſhall break or enter by force into any houſe or ſhop by night or by day for any of the purpoſes aforeſaid, ſuch offender ſhall be adjudged guilty of felony without benefit of clergy.

Felonies enacted in the time of king George II.

I. Maliciously breaking down turnpikes.

BY 1 *Geo.* 2. *cap.* 19. 5 *Geo.* 2. *cap.* 33. 8 *Geo.* 2. *cap.* 20. It is made felony without benefit of clergy for any person maliciously to break down or destroy any turnpike-gate or other fence belonging to such turnpike erected to prevent passengers from passing by without paying the toll, or forcibly to rescue any person lawfully in custody for such offense.

Attainder by this act not to work corruption of blood, loss of dower or forfeiture.

II. Forging of deeds, stealing bonds, &c.

By 2 *Geo.* 2. *cap.* 25. The forging or counterfeiting, or procuring to be forged or counterfeited any deed, will, bond, writing obligatory, bill of exchange, promissory note for payment of money, the indorsement or assignment of any bill of exchange, or promisory note for payment of money, or any acquittance or receipt for money or goods, or knowingly to utter or publish as true any forged deed, &c. with intention to defraud any person, is felony without benefit of clergy.

By the same statute to steal or take by robbery any bonds, notes, orders, tallies, &c. is felony of the same nature, and in the same degree, as if the money secured by such bonds, &c. and remaining unsatisfied, had been stolen or taken by robbery.

This act was made to continue only for five years from 29 *June* 1729. and from thence to the end of the then next sessions of parliament.

III. Stealing lead, iron, &c. fixt to any house or building.

By 4 *Geo.* 2. *cap.* 32. To steal, rip, cut, or break with intent to steal any lead, iron bar, iron gate, iron palisado, or iron rail fixed to any dwelling-house or other building used with such dwelling-house, or fixed in any garden, orchard, court-yard, fence or outlet belonging to any dwelling-house or other building is felony, and so it is in the aiders and abetters, and such as shall buy or receive such lead or iron, knowing the same to be stolen.

IV. Assaulting with an intent to rob.

By 7 *Geo.* 2. *cap.* 21. It is made felony with any offensive weapon or instrument unlawfully and maliciously to assault, or by menaces, or by any forceable or violent manner to demand any money, goods or chattels of any person, with a felonious intent to commit robbery on such person.

V. Counterfeiting the acceptance of a bill of exchange, or any accountable receipt.

By 7 *Geo.* 2. *cap.* 22. If any person shall falsly make, alter, forge, or counterfeit, or cause or procure to be counterfeited, &c. any acceptance of any bill of exchange, or the number, or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intent to defraud any person, or shall with such intent knowingly utter or publish the same as true, he shall be deemed guilty of felony.

CHAP. LXV.

Certain general obſervations concerning felonies by act of parliament.

1. GEnerally if an act of parliament be, that if a man commit ſuch an act he ſhall have judgment of life and member, this makes the offenſe felony, and this was ordinarily the clauſe uſed in antient ſtatutes, as *Weſtm.* 2. *cap.* 34. (*a*), 14 *E.* 3. *cap.* 10. 28 *E.* 3. *cap.* 3. 13 *R.* 2. *cap.* 3. *&c. Co. P. C. cap.* 29. *p.* 91.

2. And conſequently there enſued thereupon corruption of blood, eſchete to the lord, and the wife's loſs of dower.

3. But yet there may be and frequently are in acts of parliament, making new felonies, proviſions, that there ſhall be no corruption of blood, diſheriſon of the heir, or loſs of dower, and this is done ſometimes by enacting words, as in 1 *Jac. cap.* 31. for going abroad with a plague-ſore, ſometimes by a proviſo, that it ſhall not extend to corruption of blood, loſs of dower, *&c.* as 8 *Eliz. cap.* 3. 5 *Eliz. cap.* 14. and ſometimes by the words *ſaving to the wife her dower, and to the heir his inheritance*, as upon the ſtatute of 1 *Jac. cap.* 12. for witchcraft.

4. But notwithſtanding ſuch a clauſe the king ſhall have the forfeiture of his lands during his life, and alſo his goods, for no eſchete can come to the lord, where the inheritance is ſaved to the heir.

5. But by a ſpecial clauſe forfeiture of goods as well as of lands may be provided againſt, as in the act of 1 *Jac. cap.* 31. of going out with a plague-ſore. *Co. P. C. cap.* 6. *p.* 47. and *cap.* 28. *p.* 90.

6. A ſa-

(*a*) See 2 *Co. Inſtit. p.* 434.

6. A ſaving or excluſion of corruption of blood doth virtually make the heir inheritable, and ſaves alſo the woman's dower. *Co. P. C. cap.* 28. *ſuper ſtatut.* 1 *Jac. cap.* 31.

7. By an act making a new felony clergy is not excluded from the offender without ſpecial words. *Co. P. C. cap.* 19. *p.* 73. *ſuper ſtatut.* 8 *H.* 6. *cap.* 12. againſt ſtealing records.

8. In all acts making a new treaſon, felony, or miſpriſion of treaſon peers are to have their trial by their peers, tho no ſpecial clauſe enacting it. *Co. P. C. cap.* 27. *p.* 89. *ſuper ſtatut.* 1 *Jac. cap.* 11. for marrying two huſbands.

9. An act making any offenſe to be a felony, tho it ſpeak not of acceſſaries before or after, yet they are impliedly contained (*b*).

10. Nay, altho the ſtatute make an offenſe to be felony in them that commit it, their counſellers, procurers, and abetters to be felons, and ſpeak nothing of acceſſaries after; yet by the opinion of my lord *Coke* receivers or acceſſaries after are alſo virtually implied, as in the ſtatute of *Weſtm.* 2. in rape, *Co. P. C. cap.* 19. *p.* 72. upon the ſtatute of 3 *H.* 7. *cap.* 2. for carrying away women, *Co. P. C. cap.* 12. *p.* 61. upon the ſtatute of 5 *H.* 4. *cap.* 4. againſt multiplication, *Co. P. C. cap.* 20. *p.* 74. upon the ſtatute of 1 *Jac. cap.* 12. of witchcraft, *Co. P. C. cap.* 6. *p.* 45. *in fine*, tho *Stamford* be of another opinion (*c*).

11. An act, that makes an offenſe by name, as rape, *&c.* to be felony, virtually makes all that are preſent, aiding, and aſſiſting principals, tho one only doth the fact, tho as to point of clergy in ſome caſes it differs; *de quo poſtea.*

12. An act, which makes the offender, his counſellers and abetters guilty of felony, yet regularly makes not the counſellers, procurers or abetters principals, unleſs preſent, but, if they be abſent, leaves them in the condition of acceſſaries before, as upon the ſtatute of 1 *Jac. cap.* 12. of witchcraft, and other ſtatutes of that kind, unleſs in expreſs words it makes them all principals, as is done by the ſtatute of 3 *H.* 7. *cap.* 2. *Co. P. C. cap.* 12. *p.* 61. the only inſtance of that kind.

2 13. In

(*b*) *Co. P. C. p.* 59. (*c*) *Stamf. P. C. fol.* 44. *b.*

13. In an act limiting a ſecond offenſe to be felony, but the firſt only a miſdemeanor, there muſt be two things to make the ſecond offenſe felony, *viz.* 1. A judgment given for the firſt offenſe. 2. The ſecond offenſe muſt be committed after the judgment for the firſt, otherwiſe it makes not felony, as in caſe of forgery upon the ſtatute of 5 *Eliz. cap.* 14. *Co. P. C. cap.* 75. *p.* 172. (*d*), and upon the ſtatute of 1 *Jac. cap.* 12. of witchcraft. *Co. P. C. cap.* 6. *p.* 46. 2 *Co. Inſtit. p.* 468.

14. Therefore where thoſe and ſome other ſtatutes ſpeak of a ſecond offenſe after a conviction of a former, it is not intended barely of a conviction by verdict, unleſs judgment be given upon it. *Co. P. C. p.* 46.

15. An act making a felony and limiting it to be tried in the county, where the party is apprehended, unleſs there be negative words, *and not elſewhere*, is but cumulative, and he may be indicted where the offenſe was committed, as upon the ſtatute of 1 *Jac. cap.* 11. marrying a ſecond huſband or wife, *Co. P. C. cap.* 27. *p.* 88. and upon the ſtatute of 7 *H.* 7. *cap.* 1. and 3 *H.* 8. *cap.* 5. ſoldiers departing. *Co. P. C. cap.* 26. *p.* 86, 87.

16. A ſecond ſtatute enacting the ſame offenſe to be felony, that was ſo enacted before, with ſome alterations is but cumulative, and no repeal of the former act; as the ſtatute of 3 *H.* 8. *cap.* 5. of ſoldiers, making their departure without the licence of the king's lieutenant felony, (where the act of 7 *H.* 7. *cap.* 1. makes it felony, if without the captain's licence,) yet repeals not the former, becauſe it is but an affirmative act; ſo 39 *Eliz. cap.* 4. for baniſhing incorrigible rogues is not taken away by 1 *Jac. cap.* 7. which adds burning in the ſhoulder, and ſending them to their laſt habitation.

17. If one ſtatute be grafted upon another ſtatute relative to it in order to the better execution of a former ſtatute, if the former be repeald, the latter is thereby virtually repeald, as the ſtatutes of *Labourers* (*e*) being repeald by 5 *Eliz. cap.* 4. the ſtatute of 3 *H.* 6. *cap.* 1. making congregations of

(*d*) *Vide ſupra. p.* 685. (*e*) 23 *E.* 3. *cap.* 1. and 25 *E.* 3. *cap.* 1.

maſons felons is thereby repeald (*f*). *Co. P. C. cap.* 35. *p.* 49.

18. If a ſtatute be but temporary and diſcontinued, and then revived by a new act of parliament, or if a ſtatute be made touching a new felony, and repeald and re-enacted, the concluſion of the indictment *contra formam ſtatutorum* is good, but the beſt way is to conclude *contra formam ſtatut. in hujuſmodi caſu edit. & proviſ.* with an abbreviation, becauſe in conſtruction of law it ſhall be taken either *ſtatuti* or *ſtatutorum*, which may beſt maintain the indictment in point of law (*g*).

19. A ſtatute making a new felony of an offenſe, that conſiſts of an act partly in the kingdom and partly out of the kingdom, and limiting it to be tried where the offenſe is committed, ſhall be conſtrued to be where that part of the offenſe is committed, that is within the kingdom, as upon the ſtatute of 1 *Jac. cap.* 2. paſſing the ſea and ſerving a foreign prince without taking the oath of obedience ſhall be tried in that county, where the part was, that he paſſed the ſea. *Co. P. C. cap.* 23. *p.* 80.

20. An act making a new felony extends not to an infant under the age of diſcretion, *viz.* fourteen years old; but if he be of that age, it binds him. *Plowd. Com.* 465. *a. Eyſton* and *Stud's* caſe.

21. Where the word *king* is perſonal to the then king, or extends to his ſucceſſors in acts of parliament? It is true in grants of judicial or miniſterial offices, that concern adminiſtration of juſtice, as judges or ſheriffs, a grant of ſuch an office *durante beneplacito regis* is ſimply determind by the king's death. 12 *Co. Rep. p.* 48. Nay the grant of a judicial office by the king *quam diu ſe bene geſſerit*, tho it be a freehold, determines by the king's death, for it is perſonal to the king that grants them; but it is held, that the grant of offices of another nature, or of lands *durante beneplacito noſtro* doth not determine by

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(*f*) For this laſt mentiond ſtatute recites as the ground thereof, that the congregations of maſons had violated the good effect of the ſtatutes of *Labourers*.

(*g*) But this piece of our author's advice cannot now be obſerved, becauſe by the late acts of 4 *Geo.* 2. *cap.* 26. & 6 *Geo.* 2. *cap.* 6. all indictments, informations, &c. are required to be in words at length, and not abbreviated.

by the death of the king without ſome act or declaration by the ſucceſſor to determine it. 12 *Co. Rep. p.* 48, 49.

But as touching acts of parliament, regularly the word *king* extends to his ſucceſſors (*b*), and therefore the ſtatutes of 11 *H.* 7. *cap.* 18. for ſervice in the king's wars, 7 *H.* 7. *cap.* 1. for departing of ſoldiers, tho the preamble ſeems perſonal to that king, yet (it hath been ruled) do include ſucceſſors, *Co. P. C. cap.* 26. *p.* 86. *Dy.* 211. *a.* ſo the ſtatute of 23 *H.* 8. *cap.* 4. for brewers, *Noy's Rep. p.* 118. *Chalchman* and *Wright.* So *Poyning's* law 10 *H.* 7. in *Ireland* for the manner of paſſing acts of parliament, tho that act ſpeak only of the *king* without *ſucceſſors*, yet it extends to his ſucceſſors, and ſo declared 3 & 4 *P. & M. cap.* 4. *in Hibernia*, 12 *Co. Rep.* 109.

And altho the power of altering the laws of *Wales* was a great truſt repoſed in *H.* 8. by the ſtatute of 34 *H.* 8. *cap.* 26. for *Wales*, and was thought by ſome to ceaſe by his death, 12 *Co. Rep. p.* 48. yet they durſt not reſt upon that, but it was ſpecially repeald by the ſtatute of 21 *Jac. cap.* 10.

A ſtatute made to continue during the king's pleaſure doth not determine by his death, unleſs it be ſpecially relative to the perſon of the king, as *during the pleaſure of the king that now is*, or according to ſome *dicti domini regis*, *M.* 24 *Eliz. Moor's Rep. n.* 311. *p.* 176. *per Mede*; and therefore it ſeems that in ſuch caſe the ſucceſſor muſt make ſome proclamation or declaration of record to determine it, before it be determind; as upon the ſtatute of 8 *H.* 6. *cap.* 11. for the manner of taking apprentices in *London*, which was in truth the caſe in *Moore*, *n.* 311. but the ſtatute of 5 *Eliz. cap.* 4. repealing all acts touching apprentices and labourers, and making a ſpecial proviſion to ſave the cuſtoms of *London* hath quieted that queſtion.

By the ſtatute of 8 *H.* 6. *cap.* 24. it is enacted, "That "no *Engliſhman* ſell to any merchant alien any merchandize, "but for ready payment." By the ſtatute of 9 *H.* 6. *cap.* 2. it is enacted, "That notwithſtanding the former ſtatute they "may ſell for ſix months time, and this ordinance ſhall en-"dure ſo long as ſhall pleaſe the king." It is held 10 *H.* 7. 7. *b.* that

(*b*) *Vide ſupra p.* 100.

that this ſtatute remains as a ſuſpenſion of the former act of 8 *H.* 6. notwithſtanding the death of *Henry* VI. till repeald by proclamation by his ſucceſſor.

And yet in caſe of capital offenſes limited and *de novo* enacted by act of parliament to continue during the king's pleaſure it is not ſafe to proceed upon them after the king's death, and tho in matters of miſdemeanors ſuch continuance is limited by acts of parliament, yet I do not remember any ſuch kind of limitation in acts enacting capital offenſes, but they are either perpetual or limited to continue for a time certain, as ſeven years, *&c.* or till the end of the next ſeſſion of parliament, *&c.*

22. An act of parliament, that makes an offenſe felony, doth conſequently introduce the puniſhment of concealing, that is, miſpriſion of felony; and every offenſe made felony by act of parliament includeth miſpriſion, and the party may be indicted of miſpriſion of felony, and thereupon fined and impriſond, 2 *R.* 3. 10, 11. And yet in *Co. P. C. p.* 133. upon the ſtatute of 33 *H.* 8. *cap.* 1. of falſe tokens, it is ſaid *where a corporal puniſhment only is inflicted by act of parliament, the party cannot be fined and impriſond,* which is to be underſtood with two cautions, *viz.* 1. Where the indictment, *&c.* is grounded for the ſame offenſe containd in the ſtatute, and therefore it croſſeth not the caſe of 2 *R.* 3. for there he was indicted for *miſpriſion,* and not for *felony.* 2. Where it was an offenſe at common law, there if the indictment be grounded barely at common law, he may be fined and impriſond, tho the ſtatute limit a corporal puniſhment, as in caſe of falſe tokens he may be indicted as a cheat. (*)

(*) Here our author had wrote the title of another chapter *Touching piracy,* but did not proceed in it, perhaps becauſe he had referd what he thought needful to be ſaid on that head to the chapter of *clergy, Part* II. *cap.* 30.

The End of the Firſt Volume.

Addenda in Notis.

Ad p. 270. *l.* 19. *Rot. Parl.* 11 *H.* 6. *n.* 43. *A Roy noſtre Soverayne Seigneur* Beſeechen humbly your communes of this preſent parlement, that where one *John Carpenter* of *Bridham* in the ſhire of *Suſſex* husbondman, the vii day of *Feverer* the yere of youre noble reigne the viii, ſaying to *Iſabell* his wyff, that was of the age of xvi yere, and hadde be maried to hym but xx dayes, that they wold goo togedre on pilgremage, and made to arraye hir in hir beſt arraie, and toke hir with hym fro the ſaid toune of *Bridham* to the toun of *Stoughton* in the ſaid ſhire, and there with woode he ſmote the ſaid *Iſabell* his wiff on the hede that the brayne wende oute, and with his knyff gaf hir many other dedly woundes, and ſtreped hir naked out of hir clothes, and toke his knyff and ſlytte hir belly from the breſt doune, and toke hir bowels oute of hir body, and loked if ſhe were with child. And thus the ſaid *John* murdrid horibly his wiff, of the which horibly murdre the *Thurſday* next after the feſt of Seint *Ambroſe* the biſhop, the yere of youre reigne by foreſeid, the ſaid *John* was endited byfore Sir *John Bohun* Knyght, Sir *Henry Huſee* Knyght, and *William Sydney* your commiſſioners of your pees withinne the ſhire foreſeid, and proceſſe made out upon the ſame enditement according to your lawes till the ſame *John Carpenter* was outlawed of the ſaid mourdure, and now gratiouſly for the ſame cauſe arreſte, and in your priſone called the king's bench: Pleaſe hit to youre hie right wiſeneſſe to conſidere the horrible murdure foreſeid, and by auctorite of this your hie court of parliament to ordeine, that the ſaid *John Carpenter* may be juged as a traytour, and that your jugges have power to geve judgement upon him to be drawed and hanged as a traytour, in eſchewyng of ſuch horrible mourdurs in tyme comyng, ſavyng allwayes to the lords of the fee eſcheres of his landes after yere, day and waſt.

Pur ceo qil ſemble encountre la libertee de Seint Eſglise, *le Roy ſ'adviſera.*

Ad p. 384. *l.* 6. after *electa t. ſcripturæ ſacræ contraria*, for ſo *Groſted* expreſt himſelf, altho theſe words are omitted in our author's MS. See *Mat. Paris, p.* 874.

Ad p. 396. *nat.* (*u*) *in fine.* The truth is, the writ for burning *Sawtre* was indeed a ſpecial act of parliament made for that purpoſe, for ſo is a writ *teſte'd per regem & concilium in parliamento* to be intended. See the prince's caſe, 8 *Co. Rep. fol.* 19. *a.* Nor do I find any footſteps of hereſy being puniſhed capitally before this ſtatute and that of 2 *H.* 4. The notion that the writ *de hæretico comburendo* lay at common law ſeems to be a miſtake, for tho that writ be in the printed regiſter, yet it is not in the antient manuſcript regiſters; ſee *State Tr. Vol.* II. *p.* [275]. That this was not the antient puniſhment of heretics in *England*; ſee *Mat. Paris. p.* 105. for *Bracton* [*Lib.* III. *de coronâ cap.* 9.] *Britton* [*cap.* 9] *Fleta* [*Lib.* I. *cap.* 29 & 37]. ſpeak not of heretics, but of Apoſtates and infidels: And tho by the imperial law ſome particular hereſies were puniſhable with death; ſee *Cod. Lib.* I. *tit.* 5. *l.* 11, 12, &c. yet it does not appear, that even in the empire hereſy in general was puniſhed capitally, till the conſtitution of *Frederic* II. about the year 1234. which indiſtinctly adjudges all heretics to the flames; but in *England* the uſual puniſhment ſeems to have been impriſonment, and even this was not allowable, tho he were *hæreticus contumax*, before the pretended ſtatute of 5 *R.* 2. without the king's ſpecial licenſe; an inſtance whereof is in *Rymer's Fœdera*, Tom. VI. p. 651. *Rex venerabili epiſcopo* Londoniæ *ſalutem. Quia accepimus per inquiſitionem veſtram, quòd* Nicholaus *de* Drayton ——— *coram vobis congruâ convictus & pro hæretico adjudicatus exiſtit, quòdque in ſuo errore nephando animo indurato nequiter perſeverans, ad fidei catholicæ unitatem redire non curavit nec curat in præſenti, licèt ſæpiùs ad hoc excitatus & inductus, ſententiam majoris excommunicationis in hac parte incurrendo. Cum igitur ſancta mater eccleſia* ita tales hæreticos perſequitur, *ne ſuo veneno alios inficiant, ut in carceribus cuſtodiri præcipiat. Super quo nobis ſupplicaſtis, &c. Nos ſupplicationi veſtræ prædictæ gratanter conſedentes, ad ipſum* Nicholaum *hæreticum carcerali cuſtodiæ veſtræ mancipato, & ipſum in carcere veſtro cuſtodiri faciendum, quouſque dictum errorem ſuum revocaverit, & ad fidei catholicæ unitatem redire voluerit,*

quantum in nobis eſt, licentiam concedimus ſpecialem. Rot. Pat. 34 E. 3. p. 1. m. 23. dorſo.

Ad p. 490. *in fine. Placita coram juſticiariis itinerantibus apud crucem lapideam in com.* Midd. *anno* 2 E. 1. *incipiente* 3. Rot. 13. *in dorſo.* Seyton' *Alice de Coudle* was arraigned *pro morte Johannis Lipertung*, and pleaded, that ſhe killed him *ſe defendendo*, "eò quòd "burgauit domum ſuam; & de bono "& malo ponit ſe ſuper patriam; & "xii juratores dicunt, quòd prædicta *Alicia* occidit prædictum *Johannem* ſe "defendendo, eò quòd voluit domum "ſuam burgaſſe, & ipſam occidiſſe, ſi "poſſet. Ideò inde quiera. Et catalla "prædicti *Johannis* confiſcantur." *Placita coram eiſdem juſtic. ibidem.* Rot. 12. in dorſo. Thomas le Chapeleyn *nequiter, & in felonia, fregit oſtium domûs* Iſabellæ Lucas *de* Bottewell. Hue and cry was raiſed, and he was purſued, and killed *in fugiendo* by one *William le Javene. Javene* brought the king's pardon pro morte illâ, "Ideò conceditur ei "firma pax, & quia prædictus *Thomas* "*le Chapeleyn* occiſus fuit in fugiendo, catalla ejus confiſcantur.

Ad p. 508. *l.* 15. *comes into the dwelling-houſe*, but as the caſe is reported in *Kel.* 31. he was indicted *for breaking* into the houſe. *Vide infra Part* II. *p.* 358.

Ad p. 566. *l. ult. H.* 7 *E.* 2. *Rot.* 88. This was the caſe of *Thomas de Hederſete* and *John de Upſtone*, who being convicted *de quod incendium & combuſtionem domorum villæ de* Lenne *ex præcogitatâ malitiâ felonicè perpetrârunt*, had judgment *quòd ſuſpendantur.*

Ad p. 602. *M.* 28 *E.* 3. *Rot.* 32. "The abbot of *St. Albans* was impleaded coram rege, pro evaſione priſonum "à gaolâ de *Sancto Albano*, cujus cuſtodiam idem Abbas habet, ut de jure "abbathiæ ſuæ;" amongſt whom was *John de Heremyngford* a clerk convict; but upon the jury's finding, "quòd i"dem *Johannes* de *Heremyngford* "tempore evaſionis prædictæ, ſeu ali"quo momento ante recaptionem e"jusdem, non fuit extra viſum cuſtodiæ "dictæ gaolæ ſub prædicto Abbate, "conſideratum eſt, quòd prædictus Ab"bas eat inde quietus.

M. 45 *E.* 3. *Rot.* 17. This was the caſe of *William Bakere*, who was taken *cum bonis & catallis juratis* by the conſtables of *Danbury*, and ſet in the ſtocks, from whence he eſcaped; upon which the ſaid conſtables were brought *coram rege ad reſpondendum*, &c. and pleaded, "quòd poſtquam latro ceppos "fregit, ipſi eum recenter inſecuti fue"runt, viſum ſuper ipſum ſemper ha"bentes," till they retook him, and committed him to the gaol of the ſaid town; "et quòd prædictus latro adhuc "in eadem gaolâ exiſtit, &c." The king's attorney replied, and joined iſſue with them, as to their keeping conſtant view of him till he was retaken. "Et "juratores dicunt, quòd prædictus latro "arreſtatus & captus fuit per eoſdem "conſtabularios, & in ceppis poſitus, & "quòd iidem conſtabularii prædictum "latronem poſtea permiſerunt evadere, "abſque hoc quòd ipſi habuerunt viſum "ſuper præfatum latronem in evadendo, "prout ipſi ſuperiùs allegârunt. Ideò "conſideratum eſt, quòd prædicti con"ſtabularii erga dominum regem de cen"tum ſolidis pro evaſione prædictâ one"rentur.

Ad p. 621. *Mich.* 7 *R.* 2. *Rot.* 3. This was the caſe of *John*, Vicar of *Round Church* in *Cambridge*, who was indicted, that whereas one *William Gore* an approver, priſoner in the caſtle of *Cambridge*, "laicus erat tempore captionis "corporis ſui, jam per aſſenſum, & li"centiam gaolarii & janitoris ibidem, "irruditus [cruditus] eſt, & informa"tus de leturâ [literaturâ] per eun"dem vicarium, &c." Upon this indictment the vicar ſurrendred himſelf *coram rege*, and was arraigned *de felonia prædictâ*, and pleaded not guilty. The court bailed him till his trial, which was before the judges of *niſi prius* at *Cambridge*, where the jury found, "Quòd "prædictus *Johannes* vicarius in nullo "eſt culpabilis de felonia, nec de aliqui"bus articulis ſibi impoſitis, nec un"quam ſe ea occaſione retraxit. Ideò "conſideratum eſt, quòd eat inde qui"etus.

Ad p. 677. The reaſon why I ſay *preſt* muſt now be underſtood in the active ſenſe, is becauſe, tho it be vulgarly uſed in a paſſive ſignification for being taken away by compulſion, yet in legal underſtanding it cannot now be applied to any to make him a liſted ſoldier, and ſubject to penalties as ſuch, unleſs he actively do ſomewhat, as taking earneſt, or the like, whereby he voluntarily conſents to his being liſted, and ſo amounts to the ſame as *taking preſt.*

Ad p. 695. The ſtatute of 1 *Jac. cap.* 12. againſt conjuration, witchcraft, &c. is lately repeald by an act of this preſent parliament, *viz.* 9 *Geo.* 2. *cap.* 5.